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INTRODUCTION

This case and the subject motion present an issue of first impression of significant public importance—whether large scale public systems of agricultural drainage infrastructure that discharge extraordinarily high levels of nitrate pollution to the Raccoon River are “point sources” required to obtain discharge permits under the Clean Water Act, 33 U.S.C. § 1251, et seq. (“CWA”) and its Iowa statutory analog, Chapter 455B, Code of Iowa (“Ch. 455B”).

The CWA prohibits the “discharge of any pollutant” except as authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit. 33 U.S.C. §§ 1311(a), 1342(a) (2015). NPDES permits are issued by either the Environmental Protection Agency (“EPA”) or a state agency such as the Iowa Department of Natural Resources (“IDNR”) to which CWA authority has been delegated. 33 U.S.C. § 1342(a), (b). The term “discharge of a pollutant” is defined by the CWA as “*any addition of any pollutant to navigable waters from any point source.*” 33 U.S.C. § 1362(12)(A) (emphasis added). A “point source” is in turn defined as:

[] *any discernible, confined and discrete conveyance, including but not limited to any pipe, [or] ditch . . . from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.*

33 U.S.C. § 1362(14) (emphasis added). Iowa’s corresponding statutory provision is materially similar. See Iowa Code § 455B.171(19) (2015).

Drainage Districts add pollution (nitrate) to navigable waters (the Raccoon River) from discernable, confined, and discrete conveyances (pipes and ditches). Drainage Districts are point sources because they are no different than other pipes and ditches that obtain NPDES permits. To borrow a phrase from a highly placed Iowa official, “a pipe is a pipe.”¹ Indeed it is, and should be regulated as such.

Drainage Districts may only avoid an NPDES permit obligation if one of the two agricultural exclusions applies. For the reasons stated below, no exemption applies in this case.

DMWW asserts a “citizen suit” under the CWA, 33 U.S.C. § 1365, and Ch. 455B, Iowa Code § 455B.111, against Drainage Districts to enforce compliance with permitting requirements applicable to point sources. (Dkt. 2 ¶¶ 159-216). DMWW has a vital stake in the quality of its source waters and is particularly concerned with nitrate pollution in the Raccoon River. Nitrate in the Raccoon River has exceeded safe drinking water standards with greater frequency and alarming intensity.

Drainage Districts have no NPDES permits and deny any obligation or intent to obtain them based on a purported limited existence status under Iowa law, their relationship to agriculture, and a failure of administrative agencies to previously enforce the permitting requirement against drainage districts. They are not only unregulated, but also disclaim any and all responsibility for and authority over the pollution they export downstream. Drainage Districts present a complex argument that all agricultural drainage is nonpoint source even if conveyed by pipes and ditches. They base this on an origin myth that they say has always categorized all agricultural discharges as “nonpoint” under the CWA. No such treatment has ever been set forth

¹ Donelle Eller, [Will Des Moines water lawsuit change farming rules?](http://www.desmoinesregister.com/story/money/agriculture/2015/01/18/water-pollution-lawsuit/21929897/), Des Moines Register, January 19, 2015 (as of May 1, 2016, available at: <http://www.desmoinesregister.com/story/money/agriculture/2015/01/18/water-pollution-lawsuit/21929897/>) (quoting Iowa Secretary of Agriculture Bill Northey).

in the text of the statute or now exists in the current regulations.

The issues on this motion come down to the meaning of the statutory text as applied to the exact facts here: Is the discharge of pollution from Drainage Districts exempt under federal and state statutory texts as “agricultural stormwater discharges” or “return flows from irrigated agriculture”? Neither proposition can be sustained on undisputed facts and so the subject motion should be overruled to allow the issues to be reached at trial.

STATEMENT OF FACTS

DMWW is a municipal water utility in Des Moines, Iowa organized and acting under Iowa Code Chapter 388, which provides water service regionally to about 500,000 Iowans throughout the Des Moines metro area. (Dkt. 2 ¶ 23; Pl. App. at 1761). DMWW obtains its source water from the Raccoon and Des Moines Rivers, (Pl. App. at 1756-1757), for treatment at its three water treatment plants (“WTPs”)—the Fleur WTP, the McMullen WTP, and the Saylorville WTP. (McCurnin Tr. 32:8-15 (Pl. App. at 2140); (Pl. App. at 1773-1774, 1756-1757)). DMWW’s WTPs must treat and control for a variety of contaminants in their source water including nitrate. (McCurnin Tr. 104:4-106:6 (Pl. App. at 2154-2155); Mitchell Tr. 36:2-20 (Pl. App. at 2173); (Pl. App. at 1776, 1779)). Nitrate, a polyatomic ion with the molecular formula of NO_3 , is one part of the problem that is commonly referred to as “nutrient” pollution. (Pl. App. at 683-686, 896-898).

Nitrate is regulated by the Safe Drinking Water Act (“SDWA”) which establishes a total maximum contaminant level (“MCL”) for nitrate in drinking water of 10 milligrams per liter of water (“mg/L”). 42 U.S.C. §§ 300f et seq.; 40 C.F.R. § 141.51(b). Nitrate is hazardous because, among other things, it can cause infants under the age of 6 months to become seriously ill and suffocate. See 40 C.F.R. § Pt. 141, Subpt. Q, App. A, App. B; 40 C.F.R. § 141.154(c). Both of

DMWW's primary source waters—the Des Moines and Raccoon Rivers—frequently have nitrate concentrations that exceed the 10 mg/L MCL. (Pl. Stmt. Add. Facts ¶ 271; Pl. App. at 1568-1569).

Unlike organic contaminants such as bacteria, nitrate cannot be eliminated by the addition of chemicals like chlorine. (Pl. Stmt. Add. Facts ¶ 185; Mitchell Aff.). Rather, nitrate requires DMWW's active management of the selection of source water, the use of an energy intensive ion-exchange system referred to as the "Nitrate Removal System", and the use of alternative treatment technologies such as the Saylorville WTP or technologies currently under design at the Fleur WTP. (Pl. Stmt. Add. Facts ¶ 187; McCurnin Tr. 34:6-18 (Pl. App. at 2141); McCurnin Tr. 35:22-36:24 (Pl. App. at 2141); Corrigan Tr. 22:17-24:23 (Pl. App. at 2048); Corrigan Tr. 35:16-36:3 (Pl. App. at 2051); Corrigan Tr. 126:16-127:19 (Pl. App. at 2062); Stowe Tr. 33:18-34:14 (Pl. App. at 2273-2274); Stowe Tr. 74:23-75:3 (Pl. App. at 2278)).

Due to the difficulty of removing nitrate from source water at the Fleur and McMullen WTPs, DMWW's front line strategy for nitrate mitigation, when possible, is to blend nitrate laden water with water that is below the MCL in order to achieve an average concentration that complies with the MCL. (Pl. App. at 1745, 1752, 1759). DMWW endeavors to ensure that the raw water it treats has a nitrate concentration below the SDWA's MCL for nitrate. (Pl. Stmt. Add. Facts ¶ 202; (Pl. App. at 1775, 1779-1780)). DMWW's last line of defense for nitrate is the Nitrate Removal System. (Pl. Stmt. Add. Facts ¶ 199; (Pl. App. at 1775, 1779-1780)).

At times the nitrate concentration in the Des Moines and Raccoon Rivers has been so high that DMWW has nearly exhausted all nitrate defenses. (Pl. App. at 639-642, 1779-1781; Corrigan Tr. 122:18-124:22 (Pl. App. 2061)). For example, in the summer of 2013, DMWW, after having exhausted all mitigation options, could only wait and hope that the nitrate

concentration would drop sufficiently to ensure compliance with the SDWA. (Pl. App. at 1779-1781).

The most significant source of nitrate pollution in the Raccoon River is agricultural drainage. (Pl. Stmt. Add. Facts ¶ 286; Schnieders Tr. 45:14-46:18 (Pl. App. at 2235); Schnieders Tr. 57:1-15 (Pl. App. at 2238); (Pl. App. at 677)). This fact is not a secret. (Pl. App. at 1597-1602, 1881-1882). For decades, researchers and government officials, including the State of Iowa, have known that the practice of intensive drainage of agricultural land in regions like northwestern and north central Iowa provides a short-circuit for nitrate and other contaminants to reach streams and rivers. (Pl. App. 1881-1882; Skopec Tr. 21:2-8 (Pl. App. at 2244); Skopec Tr. 151:9-152:13 (Pl. App. at 2268); Corrigan Tr. 74:22-75:12 (Pl. App. at 2056); (Pl. App. at 913, 922, 929-930, 1371, 1374)). Although the nitrate problem has been identified and studied for many decades, it has not been corrected, and its impact on DMWW continues to worsen. (Pl. App. at 1568-1569).

Agricultural drainage is facilitated in Iowa by political subdivisions known as drainage districts. See Iowa Code Ch. 468; State ex rel. Iowa Emp't Sec. Comm'n v. Des Moines Cnty., 149 N.W.2d 288, 291 (Iowa 1967). The Drainage Districts are organized and existing under authority of Article I, § 18 of the Iowa Constitution and Iowa Code Chapter 468. (Hecht Tr. 36:7-11 (Pl. App. at 2122); Hecht Tr. 47:16-23 (Pl. App. at 2125); Hecht Tr. 80:22-81:2 (Pl. App. at 2133-2134)). They are managed or jointly managed by the Sac County Board of Supervisors, Buena Vista County Board of Supervisors, and Calhoun County Board of Supervisors as trustees under Iowa Code Chapter 468. (Hecht Tr. 35:25-36:16 (Pl. App. at 2122)).

Drainage districts create and maintain government infrastructure for the transport of

surface water and groundwater from agricultural fields to the Raccoon River. (Droessler Tr. 41:19-70:2 (Pl. App. at 2093-2101); Sands Tr. 84:20-23 (Pl. App. at 2200); (Pl. App. at 252-291)). To achieve their purpose, the Drainage Districts have constructed a system of buried collector main pipes, surface ditches, culverts and other conveyances that discharge water. (Hecht Tr. 51:8-24 (Pl. App. at 2126); Droessler Tr. 30:16-33:15 (Pl. App. at 2096)). Drainage districts are designed for the topography of the land and use gravity to move water from within the district to rivers. (Droessler Tr. 71:16-74:15 (Pl. App. at 2101)). Drainage districts use their authority to obtain and own easements from private landowners and to create and maintain drainage district infrastructure. (Hecht Tr. 51:8-22 (Pl. App. 2126); Droessler Tr. 112:16-113:11 (Pl. App. at 2110)). Drainage districts pay for this infrastructure with assessments to land owners within their borders based on the benefit each landowner receives from the presence of the drainage district infrastructure. (Hecht Tr. 17:14-24 (Pl. App. at 2119); Hecht Tr. 19:4-20:9 (Pl. App. at 2119); Droessler Tr. 39:25-41:11 (Pl. App. at 2093); (Pl. App. 0532-0549)).

There are approximately 3,000 drainage districts in Iowa, mostly in a geologic area known as the Des Moines Lobe. (Pl. App. at 909). The Des Moines Lobe stretches across northwestern and north central Iowa and covers portions of Buena Vista, Calhoun, and Sac Counties. (Pl. App. at 899). Drainage districts in the Des Moines Lobe generally parallel the Des Moines and Raccoon Rivers. (Pl. App. at 909). Drainage is necessary in the Des Moines Lobe because of poor drainage characteristics of the soils, including a lack of natural streams. (Pl. App. at 899).

In the 1800s, settlers found the region nearly uninhabitable due to swampy conditions on the native wet prairie. (Droessler Tr. 26:1-18 (Pl. App. at 2089); Droessler Tr. 28:18-29:14 (Pl. App. at 2090); Skopec Tr. 20:10-22:5 (Pl. App. at 2243)). To ameliorate this condition, systems

of ditches and buried pipes were installed to drain and collect water and transport it to streams and eventually into the Raccoon River. (Hecht Tr. 65:8-17 (Pl. App. at 2130); Sands Tr. 79:23-80:11 (Pl. App. at 2199); (Pl. App. at 1034)). Buried tile lines are perforated to allow water to infiltrate from the surrounding soil so that the water can be transported. (Droessler Tr. 31:1-9 (Pl. App. at 2091)). Drainage districts were created as governmental entities that could facilitate the orderly installation of the required infrastructure regardless of the private ownership of land. (Droessler Tr. 34:25-35:22 (Pl. App. at 2092)).

Subsurface drainage provides two primary benefits to agriculture. First, subsurface drainage removes water so cultivation can occur. (Hecht Tr. 65:8-17 (Pl. App. at 2130); Sands Tr. 79:23-80:11 (Pl. App. at 2199); (Pl. App. at 1034)). Second, drainage lowers the water table so that the roots of crops can extend deeper into the soil, which allows for increased yields. (Skopec Tr. 19:17-25 (Pl. App. at 2243); Sands Tr. 100:8-101:10 (Pl. App. at 2202-2203); (Pl. App. at 1034); (Pl. App. at 923-924)).

Lowering the water table has another effect—it facilitates nitrate creation through a process known as mineralization. (Skopec Tr. 37:16-38:5 (Pl. App. at 2248); (Pl. App. at 643, 898, 923)). Mineralization occurs when organisms consume organic matter and requires warm temperatures and the presence of ample oxygen. (Mitchell Tr. 22:20-23:9 (Pl. App. at 2170); (Pl. App. at 911-912, 923)). Under natural conditions, water would saturate most of the soil profile making the area below the surface a low oxygen environment. (Droessler Tr. 26:1-18 (Pl. App. at 2090); Droessler Tr. 28:18-29:14 (Pl. App. at 2090); Skopec Tr. 20:10-22:5 (Pl. App. at 2243); Skopec Tr. 48:6-12 (Pl. App. at 2250); (Pl. App. at 914, 917-918)). Very little nitrate forms in a low-oxygen environment. (Skopec Tr. 48:6-12 (Pl. App. at 2250); (Pl. App. at 917-918)). Thus, Drainage Districts facilitate the creation of nitrate that would not otherwise exist.

Nitrate is a soluble ion that can be transported when dissolved in water. (Mitchell Tr. 23:12-16 (Pl. App. at 2170); Skopec Tr. 21:2-8 (Pl. App. at 2244); (Pl. App. at 895-897, 910, 1370, 1371, 1377, 1379)). Nitrate is not absorbed in any significant quantity by water moving across the surface of the soil. (Skopec Tr. 43:9-19 (Pl. App. at 2249); Skopec Tr. 50:18-20 (Pl. App. at 2251); Skopec Tr. 60:4-9² (Pl. App. at 2253); Skopec Tr. 135:16-136:11 (Pl. App. at 2264); Skopec Tr. 142:19-143:7 (Pl. App. at 2266); McCurnin Tr. 73:4-21 (Pl. App. at 2148); Burkart Tr. 100:5-19 (Pl. App. at 2026); Burkart Tr. 181:11-17 (Pl. App. at 2038); Sands Tr. 160:19-24 (Pl. App. at 2213); Sands Tr. 171:4-172:2 (Pl. App. at 2216); Mitchell Tr. 70:18-71:4 (Pl. App. at 2182); Mitchell Tr. 154:21-155:8 (Pl. App. at 2192); (Pl. App. at 643, 666-671, 699, 895, 1015)). Nitrate is dissolved in groundwater when water infiltrates the soil profile and moves as groundwater to buried tile lines. (Skopec Tr. 43:9-19 (Pl. App. at 2249); Skopec Tr. 50:18-20 (Pl. App. at 2251); Skopec Tr. 60:4-9 (Pl. App. at 2253); Skopec Tr. 135:16-136:11 (Pl. App. at 2264); Skopec Tr. 142:19-143:7 (Pl. App. at 2266); McCurnin Tr. 73:4-21 (Pl. App. at 2148); (Pl. App. at 643, 666-671, 699, 906, 954, 1370, 1374) .

Nitrate laden groundwater is transported by Drainage District infrastructure and is discharged into the Raccoon River. (Skopec Tr. 21:2-8 (Pl. App. at 2244); Skopec Tr. 151:9-152:13 (Pl. App. at 2268); Corrigan Tr. 74:22-75:12 (Pl. App. at 2056); (Pl. App. at 922, 930, 1371, 1374)). This nitrate eventually reaches DMWW's intake on the Raccoon River at detectable quantities. (App. at 84-85, 93, 105-106).

In 2014, DMWW staff sampled and confirmed that the Drainage Districts' discharge water contained nitrate in some cases almost four times the MCL of 10 mg/L. Mitchell Tr. 62:1-

² Counsel's objection to the INRS is unfounded. As previously stated, Dr. Skopec can testify to her rationally based perceptions and expert opinions that are properly supported with foundation. Further, the Drainage Districts cite the INRS as well. (Dkt. 60-37 at 5-6).

64:25 (Pl. App. at 2180); Mitchell Tr. 66:7-67:22 (Pl. App. at 2181); Mitchell Tr. 68:10-69:22 (Pl. App. at 2181); Mitchell Tr. 124:11-126:16 (Pl. App. at 2187); Mitchell Tr. 161:25-163:12 (Pl. App. at 1609, 2193-2194; (Pl. App. at 564-567)).

Sometimes, there is a reduction in the concentration of nitrate between the time it is discharged from the Drainage Districts and the time when it reaches DMWW's Raccoon River intake. Any reduction in nitrate concentration is due primarily to a dilution of high concentration low-volume water, with high volume low-concentration of nitrate water. (McCurnin Tr. 136:25-138:20 (Pl. App. at 2159-2160); McCurnin Tr. 162:3-164:13 (Pl. App. at 2165); Mitchell Tr. 91:1-92:14 (Pl. App. at 2184); Mitchell Tr. 105:9-18 (Pl. App. at 2185); Mitchell Tr. 107:13-109:2 (Pl. App. at 2186); Mitchell Tr. 155:23-156:14 (Pl. App. at 2192); Skopec Tr. 49:1-6 (Pl. App. at 2251); (Pl. App. at 941-942)). The reduction in concentration is not caused by biological activity or some other mysterious process that removes nitrate from the river. (Skopec Tr. 48:6-12 (Pl. App. at 2250); McCurnin Tr. 45:13-46:6 (Pl. App. at 2142); McCurnin Tr. 47:7-24 (Pl. App. at 2143); Burkart Tr. 190:7-191:5 (Pl. App. at 2040); (Pl. App. at 917-919, 941-942)). If there was a significant reduction of nitrate during transport in the Raccoon River it would be reflected by a significant reduction of nitrate between the concentration observed in the Raccoon River at Van Meter and the concentration at DMWW's Raccoon River intake. (McCurnin Tr. 45:13-46:6 (Pl. App. at 2143); McCurnin Tr. 47:7-24 (Pl. App. at 2143)). DMWW has not observed any significant reduction of nitrate concentration between Van Meter and its Raccoon River intake. (McCurnin Tr. 45:13-46:6 (Pl. App. at 2143); McCurnin Tr. 47:7-24 (Pl. App. at 2143)).

The facts of this case demonstrate that Drainage Districts are responsible for creating, operating, and maintaining drainage infrastructure that perpetuates the production of nitrate.

Drainage Districts discharge this nitrate into the Raccoon River at levels that are unsafe for human consumption and this nitrate contributes to the high nitrate concentrations at DMWW's intake on the Raccoon River.

Most of these facts should not be in dispute despite Drainage Districts' attempts to ignore or obfuscate the factual record. However, there are more than a few disputed factual issues that will be highlighted throughout this brief in the context of the legal framework in which the disputes arise. The factual and legal failings in Drainage Districts' motion mean the motion should be denied.

ARGUMENT

I. The Governing Standard on Motion for Summary Judgment

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact” such that “the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). An issue of fact is genuine when “a reasonable jury could return a verdict for the nonmoving party’ on the question.” Woods v. DaimlerChrysler Corp., 409 F.3d 984, 990 (8th Cir. 2005) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A material fact “is one ‘that might affect the outcome of the suit under the governing law.’” Johnson v. Crooks, 326 F.3d 995, 1005 (8th Cir. 2003) (quoting Anderson, 477 U.S. at 248). A party opposing must show “specific facts creating a triable controversy.” Crossley v. Georgia-Pacific Corp., 355 F.3d 1112, 1113 (8th Cir. 2004) (quoting Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1085 (8th Cir. 1999)); see Fed. R. Civ. P. 56(e).

Establishing the existence, or lack, of a genuine issue of material fact requires admissible evidence. Fed. R. Civ. P. 56(c)(1), (2). Legal conclusions of lay witnesses are not admissible evidence. Howard v. Columbia Pub. Sch. Dist., 363 F.3d 797, 801 (8th Cir. 2004); Peters v.

Woodbury Cnty., 979 F. Supp. 2d 901, 921-22 (N.D. Iowa 2013). Drainage Districts contend that certain statements from DMWW’s executive officers are dispositive of legal arguments. However, these assertions of “fact” cannot be the basis for summary judgment because they are inadmissible statements of law. See Howard, 363 F.3d at 801. Contrary to any argument of Drainage Districts, this case *does* turn on the determination of questions of fact. While statutory construction is a matter of law, Johnson v. Arden, 614 F.3d 785, 790 (8th Cir. 2010), there are fact questions arising from the application of law to fact.

Therefore, Drainage Districts’ motion is deficient because, as demonstrated in greater detail in DMWW’s Statement of Disputed Material Facts and Statement of Additional Facts, Drainage Districts have not properly supported their motion with undisputed facts or a record sufficient to show they are entitled to judgment as a matter of law. Most of their assertions of facts are legal conclusions. In contrast, DMWW has properly supported its Statements of Additional Facts with admissible evidence that demonstrates, at a minimum, genuine issues of material fact regarding dispositive issues, and most particularly, the decisive fact of whether discharges of nitrate by the Drainage Districts constitute agricultural stormwater discharges.

II. The History of the CWA Informs the Analysis in this Case

An understanding of the issues here is aided by an understanding of the history and structure of federal water quality regulation.

Federal law first regulated the discharge of pollution into navigable waters and their tributaries with the enactment of the Rivers and Harbors Appropriations Act of 1899, ch. 425, § 13, 30 Stat. 1152 (codified as amended at 33 U.S.C. § 407). The scope of this regulation was extended by the Federal Water Pollution Control Act of 1948, ch. 758, Pub. L. No. 845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251 et seq.) (the “1948 Act”). The 1948 Act was

amended and greatly expanded by the Federal Water Pollution Control Act Amendments of 1972 (the “1972 Act”). Pub. L. No. 92–500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251 et seq.).

The 1972 Act reflected a new and comprehensive system of water quality regulation. As so amended, this is the law that came to be known as the “Clean Water Act.” Particularly relevant here, the CWA was further amended by the Clean Water Act of 1977 (“1977 Act”), Pub. L. No. 95–217, 91 Stat. 1566 (1977) (codified as amended at 33 U.S.C. §§ 1251 et seq.) and by the Water Quality Act of 1987 (the “WQA”). Pub. L. No. 100–4, 101 Stat. 7 (1987) (codified as amended in scattered sections of Title 33 of the United States Code.).

The stated objective of the 1972 Act was to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and to eliminate “the discharge of pollutants into the navigable waters of the . . . by 1985”³. 33 U.S.C. § 1251.

The CWA centered on two fronts. The first front assisted state and local governments with an expanded grant program for construction of primary and secondary treatment of sewage. The second established a basic structure for regulating pollutant discharges by means of technology-based standards. A key element to the 1972 Act was the establishment of a national pollutant discharge elimination system (“NPDES”) for discharge of pollution under Section 402 of the CWA, 33 U.S.C. § 1342. Under the NPDES system, the discharge of pollution from a point source is prohibited unless a Section 402 permit, or substitute, is obtained and the

³ The total elimination goal was unobtainable, and set the stage for long running controversies as the EPA sought to target priority sources, while excluding others within the scope of the CWA’s commands. See e.g. cases cited, *infra*, which reflect some of these battles. During this process, forces pro and con to CWA regulation battled unceasingly but the scope of inclusion of point sources expanded over time. This process continues today and this case fits into that picture by raising, for the first time in any proceeding known to DMWW, the question of whether drainage districts are subject to NPDES permitting.

conditions under the permit, known as effluent limitations, are met. *Id.* §§ 1311(b)(2) & 1314(b). The permit also establishes monitoring and reporting requirements. 33 U.S.C. § 1342(a)(2).

The NPDES system is supplemented by Section 404 of the CWA, 33 U.S.C. § 1344, under the administration of the United States Corps of Engineers (the “Corps”) which regulates so called “dredge and fill” activity. Although Section 404 permits are authorized and administered by the Corps, the EPA and Corps share Section 404 enforcement authority and the EPA has the sole authority to determine geographic jurisdiction and approve submitted state programs comparable to the federal program for permit issuance in all but traditionally navigable waters. 40 C.F.R. Pt. 233.

The NPDES has been described by the Supreme Court as the “linchpin” of the CWA because “it transforms generally applicable effluent limitations into the individual obligations of each discharger.” Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 300, 129 S. Ct. 2458, 2482 (2009); *see also* Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1374 (D.C. Cir. 1977) (the CWA “relies primarily on a permit program for the achievement of effluent limitations . . . to attain its goals.”) (internal quotations omitted).

By contrast, nonpoint sources are not subject to permitting regulation, but the term is not expressly defined by the CWA or by EPA regulation. Instead “nonpoint source” serves as a residual category to refer to things outside of the scope of the NPDES. Therefore, the definition of the term “point source” is the critical element in determining whether NPDES permitting applies to a particular pollution discharge.

Under the CWA, the federal government mandates and supervises the NPDES permit system. 33 U.S.C. § 1342(a). A state may assume the responsibilities of administration of the NPDES system if it has an EPA approved permit program that meets established criteria,

including authority to enforce the CWA's provisions under state law. See 33 U.S.C. § 1342(b); 40 C.F.R. §§ 123.1–123.64. Despite these explicit delegations of authority, state powers under the CWA are not without limit. 33 U.S.C. § 1342(b). The EPA retains oversight and final authority over the regulatory process under the CWA and reserves review of all permits for compliance with the CWA. Id. The EPA may withdraw certification of state authority if it determines the state is not administering the permitting program correctly. Id. § 1342(d)(2), (c)(3). IDNR assumed NPDES administrative permitting responsibilities in Iowa in 1978.

III. The Court Has Jurisdiction

Drainage Districts raise a threshold jurisdictional issue as to whether there is a justiciable case or controversy. Article III § 2 requires every plaintiff to have suffered an actual injury that is traceable to the defendant and that can be redressed by the case. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

Although Drainage Districts are not clear on this point, it would seem that they mostly contest redressability because of their alleged special status under Iowa law that renders them beyond the reach of the NPDES system. Drainage Districts' argument, distilled to its essence, is that they do not exist as a cognizable "person" even though the facilities they create and control discharge nitrate pollution into jurisdictional waters. They claim this Court cannot effectively compel them to comply with NPDES permit requirements. This argument is not only wrong on the law, but also fundamentally mistakes the relevant standing inquiry.

DMWW will address each of the specific arguments seeking to achieve this result in Section III-B, infra at 21. However, because the general issue of justiciability has been raised, and the Court's consideration of its jurisdiction may transcend the issues argued on the current

motion, DMWW will first address the overall basis for its standing as established by the Complaint and the Record.

A. This case satisfies the criteria for a “case or controversy.”

DMWW has standing because it satisfies the three criteria for a justiciable case or controversy:

To meet the constitutional requirement for standing, a plaintiff must prove that: 1) he or she suffered an “injury in fact” that is concrete and particularized, and is actual or imminent; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) the injury likely will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 629 F.3d 387, 396 (4th Cir. 2011).

The threshold question of jurisdiction is not a matter of the ultimate merits, but is satisfied by an arguably meritorious claim. Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 89 (1998).

Standing merely “ensures that a plaintiff has a personal stake in the outcome of a dispute.”

Friends of the Earth, Inc., 629 F.3d at 396; see also Pub. Interest Research Grp. of N.J., Inc. v.

Powell Duffryn Terminals Inc., 913 F.2d 64, 72 (3d Cir. 1990).

DMWW is no mere bystander. It has a vital stake in establishing control of prolific nitrate pollution in its source waters by assuring implementation of the CWA’s NPDES requirements as to the Drainage Districts. This stake arises because drainage districts collectively are the principal source of nitrate pollution of DMWW source waters. As applied here, this interest arises from an injury in fact that is both fairly traceable to the Drainage Districts and fully redressable here.

In a citizen suit under the CWA and Ch. 455B, justiciability is inextricably intertwined with the statutory right to bring a citizen suit and the remedies available therein. The CWA defines “citizen” as “a person or persons having an interest which is or may be adversely

affected,” 33 U.S.C. § 1365(g),⁴ and provides that “any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter”Id. § 1365(a). Under the citizen suit provision, “effluent standard or limitation” includes “an unlawful act under subsection (a) of section 1311 of this title”, id. § 1365(f)(1), which is the provision that prohibits the discharge of pollution to navigable waters without an NPDES permit. The purpose of citizen suits is to supplement government enforcement of the CWA, and most particularly, to act where the governing agencies have failed to properly exercise their enforcement responsibility. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60, 108 S. Ct. 376, 383 (1987); see also Miss. River Revival, Inc. v. City of Minneapolis, 319 F.3d 1013, 1014-15 (8th Cir. 2003); see also Iowa Code § 455B.111(3) (permitting citizen suits for those “adversely affected” by violations of Ch. 455B and certain other provisions of Iowa law).

The nature and existence of DMWW’s injury is well established by comparison to the standards ordinarily applied in CWA cases that sometimes depend on citizens with aesthetic or recreational injuries that are nevertheless sufficient. See, e.g., Sierra Club v. Va. Elec. & Power Co., 2015 WL 6830301 at *8 (E.D. Va. Nov. 6, 2015). By contrast here, DMWW has economic injury that is concrete and particularized in the form of direct costs to remove nitrate as well as the costs of investments rendered necessary by heavy concentrations of nitrate discharged into the Raccoon River by Drainage Districts. (Pl. Stmt. Add. Facts ¶ 215; Stowe Tr. 323:2-19 (Pl. App. at 2291); (Pl. App. at 1688-1715, 1745, 1751, 1773-1774)). DMWW also has a regulatory compliance injury because of the ongoing risk of noncompliance with SDWA mandates. (Pl. Stmt. Add. Facts ¶ 202; (Pl. App. at 1775, 1779-1780)).

⁴ This definition is essentially met whenever the Article III tests are met. Friends of the Earth, Inc., 629 F.3d at 396.

The Record shows that these injuries are fairly traceable to measured discharges of high concentrations of nitrate by Drainage Districts into the Raccoon River or its tributaries at levels that exceed the maximum contamination level (“MCL”) of 10 mg/L prescribed under the SDWA. Expert testimony and reports by specially retained experts, and expert members of the DMWW staff, show the connection between measured Drainage District discharges and impacts on DMWW. (Pl. Stmt. Add. Facts ¶¶ 303-309; App. at 84-85, 93, 105-106; McCurnin Tr. 171:25-172:9 (Pl. App. at 2167); Mitchell Tr. 156:15-157:8 (Pl. App. at 2192)).

This more than suffices to meet the legal standard, which simply requires an injury fairly traceable to the discharges at issue. This does not require proof equivalent to “but for”⁵ tort causation, or that specific pollution by the defendants is the only source of the plaintiff’s injury:

Traceability “does not mean that plaintiffs must show to a scientific certainty that defendant’s effluent . . . caused the precise harm suffered by the plaintiffs.” Rather, a plaintiff “must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged.”

Piney Run Pres. Ass’n v. Cty. Comm’rs of Carroll Cty., 268 F.3d 255, 263-64 (4th Cir. 2001) (internal citations omitted); see also New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC, 734 F. Supp. 2d 1326, 1334 (N.D. Ga. 2010).

The CWA provides redress for DMWW’s injury. If DMWW succeeds in establishing that Drainage Districts, and by extension all other similar bodies, are required by law to obtain NPDES permits, then the existing system of regulatory control of nitrate pollution will be applied. This redress is an inherent feature of the CWA that has established the NPDES as one of the primary means of assuring water quality. Costle, 568 F.2d at 1374 .

Courts have adapted the traditional Art. III § 2 standing requirements to the citizen suit

⁵ Although not required to show standing, DMWW is prepared to show substantial evidence of tort causation.

provision of the CWA, and have developed the following summary of the elements necessary for citizen suit standing:

In a Clean Water Act case, this likelihood may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Powell Duffryn Terminals Inc., 913 F.2d at 72 ; see also Natural Res. Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 (4th Cir. 1992). The Record shows each of the Powell Duffryn elements here⁶:

First, Drainage Districts discharge nitrate into the Raccoon River either directly or indirectly by discharge to streams or ditches draining into the Raccoon River. (Pl. Stmt. Add. Facts ¶ 230; (Pl. App. at 252)). They do so without any permits (Pl. Stmt. Add. Facts ¶ 313; Hecht Tr. 81:23-82:4 (Pl. App. at 2134); Schnieders Tr. 35:5-17 (Pl. App. at 2232); Droessler Tr. 81:18-23 (Pl. App. at 2103); Wiklund Tr. 11:20-12:15 (App. at 139); (App. at 132-135)).

Second, DMWW has an interest in the purity of the Raccoon River because the Raccoon River is a primary source water. (Pl. Stmt. Add. Facts ¶ 169; (Pl. App. at 1756-1757)). This interest is adversely affected by nitrate pollution which increases DMWW's costs of operation and threatens its ability to comply with safe drinking water mandates. (Pl. Stmt. Add. Facts ¶¶ 202, 215; (Pl. App. at 1688-1715, 1745-1751, 1773-1775, 1779-1780); Stowe Tr. 323:2-19 (Pl. App. at 2291)).

Third, Drainage Districts' nitrate pollution individually contributes to DMWW's injury by discharging nitrate in concentrations exceeding safe limits at their point of discharge. (Pl.

⁶ The CWA violation in Powell Duffryn was a discharge in pollution in concentrations greater than allowed by an issued permit, rather than a discharge without any permit, but the principal is the same because any and all discharge of a pollutant without a permit is unlawful.

Stmt. Add. Facts ¶ 236; (Pl. App. at 564-567)).

Drainage Districts also cause or contribute to DMWW's injury when discharges of nitrate to which they contribute result in nitrate concentrations at DMWW's intake that exceeds safe limits. (Pl. Stmt. Add. Facts ¶ 309; (McCurnin Tr. 171:25-172:9 (Pl. App. at 2167); Mitchell Tr. 156:15-157:8 (Pl. App. at 2192)).

B. Drainage Districts' standing arguments are unfounded.

Drainage Districts argue that there is no case or controversy here because they supposedly lack the power to "redress the issue raised." (Dkt. 61-1 at 15). They base this on a theory that they lack a cognizable existence under Iowa law and wield only the power to "restore or increase water flow" in pursuit of their statutory mission of providing drainage infrastructure. (Id.). This is an extreme variation of the arguments respecting the nature of drainage districts as they apply to Counts III-XI of the Complaint which have been previously briefed to this Court and which have given rise to issues of Iowa law certified to the Iowa Supreme Court.⁷

The arguments made by Drainage Districts on this point are not really arguments going to DMWW's standing at all, but rather are simply saying that their ongoing discharge of pollution without a permit, even if unlawful under law, cannot be remedied in this suit. This claim is completely answered by the federal remedies that are provided by the CWA, which apply equally to both public and private activity. See e.g. W. Va. Highlands Conservancy, Inc. v. Huffman, 588 F. Supp. 2d 678, 688-89 (N.D.W. Va. 2009), *aff'd*, 625 F.3d 159 (4th Cir. 2010). A federal right and a federal remedy exist, and to argue that the unlawful discharge of pollution by Drainage Districts is not remediable even if proven is absurd on its face.

⁷ For further details DMWW refers the Court to prior Briefing of the Parties (Dkts. 47, 51-1, 53-1, 54) and the Court's Certification order (Dkt. 57).

Drainage Districts greatly overstate their lack of existence and greatly understate their powers under state law. Drainage Districts have legal existence as entities under Iowa law. As held in State ex rel. Iowa Emp't Sec. Comm'n v. Des Moines Cnty., 149 N.W.2d at 291:

[A]n organized drainage district is a political subdivision of the county in which it is located, its purpose being to aid in the governmental functions of the county. It is a legally identifiable political instrumentality.

We conclude drainage districts come within the classification of a political subdivision or instrumentality of the state, or one of its political subdivisions or instrumentalities.

They also have the power and the obligation to obtain permits from IDNR in matters within IDNR's jurisdiction. Polk Cnty. Drainage Dist. Four v. Iowa Natural Res. Council, 377 N.W.2d 236, 241 (Iowa 1985).

Drainage Districts have all the power needed to achieve their purposes under an extensive set of Iowa Code provisions contained in Ch. 468, Code of Iowa. It simply cannot be denied that Drainage Districts are subject to all applicable state and federal permitting requirements as a matter of state law.⁸ Indeed the Record demonstrates the routine recognition and accommodation of permitting requirements by Drainage Districts including dredge and fill permits. (Pl. Stmt. Add. Facts ¶ 97; Droessler Tr. 81:24-82:24 (Pl. App. at 2103)).

In any case, and more fundamentally, Drainage Districts cannot be absolved by Iowa law from compliance with federal law as a matter of the Supremacy Clause of the United States Constitution. See e.g. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (state law invalid that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). The CWA applies by its terms broadly to all polluters, including state instrumentalities and agencies. Huffman, 588 F. Supp. 2d at 688-89 (N.D.W. Va. 2009).

⁸Such state law is a condition of the delegation of CWA power to the State of Iowa. See 33 U.S.C. § 1342(b); 40 C.F.R. §§ 123.1–123.64.

Further, the authorization for citizen suit under the CWA extends to suits “against any *person* (including (i) the United States, and (ii) *any other governmental instrumentality or agency* to the extent permitted by the eleventh amendment to the Constitution).”⁹ 33 U.S.C. § 1365(a)(1) (emphasis added); see also 33 U.S.C. § 1362(5) (“The term ‘person’ means an individual, corporation, partnership, association, State, municipality, commission, or *political subdivision of a State*, or any interstate body.”) (emphasis added). Each of the Drainage Districts is a “person” for purposes of § 1365, and indeed a “proper” person within the express statutory inclusion of subsection (a)(1). This is a complete answer to any issue of redressability based on a supposed privileged status.

Drainage Districts cite nearly a dozen cases for the proposition that a party “who cannot control the outcome may not be sued” and variations thereon (Brief at 15-17). These cases are largely inapposite because none involves a citizen suit under the CWA for the kind of relief sought here, and none involves a supposed state law exculpation from responsibility for compliance with a federal permitting requirement by a local governmental body.

The leading case cited by Drainage Districts, Okpalobi v. Foster, 244 F.3d 405, 426 (5th Cir. 2001), arose from a challenge to the constitutionality of a civil tort liability rule applicable to abortion providers against the Governor and Attorney General of the State of Louisiana. It applied a standing rule applicable to a constitutional challenge to a state statute “that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute.” Id. Although such rule spoke in terms of the power of the state official involved, it was also very much about a lack of a connection between the officials and the statute at issue. Id. at 426-27.

⁹ Drainage Districts have no Eleventh Amendment immunity. See e.g. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 279-280 (1977).

The other cases relied upon by Drainage Districts likewise all involve some degree of disconnection between the plaintiff's claim or injury and the role of the putative defendant. U.S. v. Carroll, 667 F.3d 742, 745 (6th Cir. 2012) (collateral attack by IRS against Bankruptcy Court orders concerning redirection of taxpayer refunds against Trustees subject to such orders); Scott v. Taylor, 405 F.3d 1251, 1259 (11th Cir. 2005) (section 1983 redistricting case against individual legislators); McCreary v. Richardson, 2012 WL 1899591 at *4 (E.D.Tex. May 3, 2012) (prisoner case against official no longer in position of authority over prisoner); Turner v. McGee, 681 F.3d 1215, 1218-19 (10th Cir. 2012) (collateral attack on constitutionality of criminal statute against tribal court); Ege v. U.S. Dept. of Homeland Sec., 784 F.3d 791, 794-96 (D.C. Cir. 2015) (request for deletion from no-fly list against agencies without authority to delete names from list); Bronson v. Swensen, 500 F.3d 1099, 1111-12 (10th Cir. 2007) (collateral attack on constitutionality of marriage statute against county clerk); McDaniel v. Bd. of Educ. of City of Chi., 956 F. Supp. 2d 887, 892-93 (N.D.Ill. 2013) (school closing case against city not responsible for schools); Clark v. Fomby, 2012 WL 3064228 at *8 (E.D.Tex. July 26, 2012) (prisoner case against official no longer in position of authority over prisoner); Scott v. DiGuglielmo, 615 F. Supp. 2d 368, 373-74 (E.D.Pa. 2009) (prisoner case against official no longer in position of authority over prisoner); Options For Cmty. Growth, Inc. v. Wis. Dept. of Health and Family Servs., 2006 WL 2645185 at **1-4 (E.D.Wis. Sept. 14, 2006) (claim for injury under local zoning ordinance against state defendants).

No such disconnection exists here. Drainage Districts have full power and control over the instrumentality that is discharging pollution without a permit. (Pl. Stmt. Add. Facts ¶ 61; Hecht Tr. 35:25-36:16 (Pl. App. at 2122)).

An express federal prohibition against such discharge is provided by statute. The

discharge and lack of permit represent an ongoing violation of federal law and an express remedy is provided in the form of a citizen suit. U.S. Pub. Interest Research Grp. v. Atlantic Salmon of Maine, LLC., 257 F. Supp. 2d 407, 423-24 (D. Me. 2003), aff'd 339 F.3d 23, 35 (1st Cir. 2003).

Whatever else may be true, Drainage Districts have the power, indeed the duty, to comply with applicable federal law. This certainly includes the power to obtain permits, if required. The suggestion that Drainage Districts have the power to violate federal law with impunity due to a lack of power is self-contradictory nonsense.

The specific argument that the statutory process of “remonstrance” under Iowa Code Chapter 468 gives landowners a power of veto over CWA compliance by Drainage Districts cannot withstand logical review. One might as well argue that agricultural chemical factories are exempt from getting CWA permits because their company shareholders might vote to withhold funding to obtain them. Such shareholders might succeed in causing the company to be in violation of federal law, but they could not keep the corporation free from the resulting legal consequences. Drainage Districts would suffer the same fate.

Any remonstrance in defiance of relief granted in this case would, even granting the heroic assumption it was otherwise lawful under Iowa law, not be effective to defeat this Court’s writ. Its primary initial effect would be to result in appropriate penalties under the CWA and the ultimate effect would be to require termination of the ongoing discharges unless a permit was obtained. No such imaginary outcome is even remotely plausible here.

The suggestion that IDNR might decline to issue permits to Drainage Districts even if this Court were to find them to be legally required is equally misplaced. This is at best a speculation that predicts a defiance of declared federal law by state officials charged with

enforcement of such federal law that should not be presumed. DMWW's efforts to obtain clean source water surely face political resistance from Iowa officialdom, but history teaches that federal law must ultimately prevail even over the most stubborn of resistance. Cooper v. Aaron, 358 U.S. 1, 18 (1958). If need be, appropriate follow-on CWA remedies could be implemented either by the EPA or by further citizen suit. Miss. River Revival, Inc., 319 F.3d at 1014-15. These remedies might include termination of IDNR's authority under the CWA or an order to bring it into compliance with the CWA. See e.g. Save The Valley, Inc. v. U.S. E.P.A., 223 F. Supp. 2d 997 (S.D. Ind. 2002).

The factually based argument that a declaration and order herein finding Drainage Districts liable to obtain NPDES permits would not ameliorate the full nitrate treatment cost injury being suffered by DMWW because it alone would not obviate the need to treat for nitrate is wrong and misunderstands the impact on water quality in the Raccoon River that such relief against Drainage Districts would entail. It begins with the disputed assertion that the specific contribution of Drainage Districts is too small to be considered. This is at best a disputed issue of material fact, precluding summary judgment on this point. (Pl. Stmt. Add. Facts ¶¶ 303-309; App. at 84-85, 93, 105-106; McCurnin Tr. 171:25-172:9 (Pl. App. at 2167); Mitchell Tr. 156:15-157:8 (Pl. App. at 2192)). It also ignores the larger water quality injury to DMWW implicit in every introduction of unsafe nitrate levels into the Raccoon River. (Pl. Stmt. Add. Facts ¶¶ 202, 215; (Pl. App. at 1688-1715, 1745-1751, 1773-1775, 1779-1780); Stowe Tr. 323:2-19 (Pl. App. at 2291)). This again is a disputed factual issue.

This argument also mistakes the relevant standing inquiry in a CWA permitting case, which simply requires that the particular permit address the kind of injury suffered by controlling the source of pollution rather than fully ending it. Piney Run Pres. Ass'n, 268 F.3d at 263-64;

Watkins, 954 F.2d at 980.

Drainage Districts are “persons” within the jurisdictional ambit of the CWA and Ch. 455B with the power to obtain permits and comply with permitting requirements incident to their functions.

IV. DMWW’s Claims are not Barred by any Statute of Limitations

Contrary to the argument of the Drainage Districts, no statute of limitations applies to defeat DMWW’s permitting claims here because this case seeks to end ongoing illegal discharges of nitrate pollution by the Drainage Districts.

The CWA includes no express statute of limitations. Powell Duffryn Terminals Inc., 913 F.2d at 74; Atlantic Salmon of Maine, LLC., 257 F. Supp. 2d at 426-27.

Nevertheless, Drainage Districts seek to apply the six year statute of limitations of 28 U.S.C. § 2401 to bar DMWW’s permitting claims in their entirety, citing Environmental Protection Information Center v. Pacific Lumber Co., 266 F. Supp. 2d 1101, 1120 (N.D. Cal. 2003) (actions for judicial review against EPA are subject to § 2401). However, § 2401 by its terms provides only that “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” Since this is not an action against the United States, § 2401 does not apply here.

The Courts have recognized that the five year limitation period of 28 U.S.C. § 2462, which is applicable to “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise” applies, not only to civil penalty claims made by the EPA, but also to the period for which penalty claims may be made in a citizen suit. Powell Duffryn Terminals Inc., 913 F.2d at 73-76; 3M Co. v. Browner, 17 F.3d 1453, 1463 (D.C. Cir. 1994). These cases stand for the proposition that in a citizen suit, based on ongoing violations,

the maximum look-back period for civil penalties is five years.

However, this provision does not stand as a bar to the claims here even if the violations at issue began more than five years ago because DMWW seeks to remedy an ongoing violation of the CWA, as required for a citizen suit under Gwaltney of Smithfield, Ltd., 484 U.S. at 56-57. Gwaltney holds that an allegation of an ongoing violation of the CWA is a jurisdictional predicate to a citizen suit. Id. DMWW makes such allegation, (Dkt. 2 ¶¶ 182-183), and it is supported of Record (Pl. Stmt. Add. Facts ¶¶ 59, 204; Hecht Tr. 81:3-9 (Pl. App. at 2134); (Pl. App. at 1568-1569)).

There is an ongoing violation here because each discharge of a pollutant without a permit is a new violation of the CWA. When an NPDES permit is required, but not obtained, then the CWA violation is continuous and ongoing. In such event there is no accrual of a claim, and the statute of limitations does not begin to run. Atlantic Salmon of Maine, LLC., 257 F. Supp. 2d at 426-27; see also Am. Canoe Ass'n, Inc. v. D.C. Water and Sewer Auth., 306 F. Supp. 2d 30, 40-41 (D.D.C. 2004); United States v. Reaves, 923 F. Supp. 1530, 1533 (M.D. Fla. 1996).

Drainage Districts' Brief acknowledges this rule, but seeks to avoid its effect by pointing to a comment made by IDNR staff in a rulemaking proceeding before the Environmental Protection Commission ("EPC")¹⁰ in 2009 that they claim evinces an IDNR view that NPDES permits are not required of drainage districts. (App. at 189-90); (Pl. App. at 1555-1560). They then assert that this pronouncement converts DMWW's case against the Drainage Districts into a case against the IDNR, which is subject to the six year limitation of 28 U.S.C. § 2401 and that this limitation period began to run when IDNR made its comment. There are, however, many

¹⁰ The EPC is a citizen commission created by § 455A.6, Code of Iowa, which is vested with power to establish IDNR policy and with rulemaking authority under various code chapters including Ch. 455B. Although technically the Iowa rules at issue here are adopted by the EPC they will be referred to herein as IDNR rules inasmuch as they govern the IDNR's programs.

problems with this logic.

First, this case is not against the IDNR or the EPA. Rather, it is a citizen suit against the Drainage Districts. As such, it seeks to enforce the CWA where the EPA and the IDNR have not acted with respect to ongoing violations. This is the proper office of a citizen suit. Gwaltney of Smithfield, Ltd., 484 U.S. at 56-57, 108 S. Ct. at 381. To imply a limitations bar to the case from any administrative comment or period of non-enforcement would defeat the very purpose of the citizen suit to end ongoing violations where the government has not.

Second, the argument concerning the IDNR staff comment, and a supposedly applicable prior commentary by the EPA in 1976, simply begs the question whether the CWA requires NPDES permits of the Drainage Districts. This is the issue to be decided on the merits, and should not be foreclosed by any period of prior erroneous agency interpretation or inaction. Indeed, to do so would be to give an unwarranted, decisive effect to a supposed informal agency view without any critical examination. In this regard it should be noted that DMWW does not call into question any EPA regulation or any IDNR rule, but in fact relies on the regulations and rules as written. Cf. Decker v. Nw. Envtl. Def. Ctr., --- U.S. ---, 133 S. Ct. 1326, 1335-1336 (2013) (citizen suit not barred by application of direct review required under 33 U.S.C. § 1369(b) within 120 days of EPA action on regulations when no challenge made to regulations as written).

Third, the IDNR document is a vague IDNR staff comment of doubtful meaning that is not dispositive of the merits here, and indeed says nothing at all about drainage districts, as such. It was not rule or a policy statement, both of which could only be issued by the EPC under Iowa law. Iowa Code § 455A.6. See arguments at § IX of this Brief, infra at 57.

Finally, even if the IDNR's comment could be said to have set a clock running in 2009, any such clock can be reset by the agency by revisiting the question. Pacific Lumber Co., 266 F.

Supp. 2d at 1121–1122. The EPC has done that here by recently adopting revisions to the definition of “point source” in the IDNR rules. See 2016 IA Reg Text 413573 (Ns) (West),¹¹ see also Iowa Admin. Bull. at 2015-2028 (Apr. 13, 2016).

No statute of limitations runs as to a citizen suit against ongoing violations of applicable permitting requirements, and this is certainly not altered by the IDNR staff comment in EPC rulemaking relied upon by Drainage Districts.

V. The Drainage Districts Are Point Source Polluters as Defined by the Clean Water Act and Iowa Code Chapter 455B Unless an Exclusion Applies

The essential substantive question presented by Counts I and II of the Complaint, and by the subject motion, is whether the Drainage Districts are “point sources” that require NPDES permits under the CWA and corresponding provisions of Chapter 455B.

Drainage Districts argue that *all* agricultural drainage is beyond the reach of the NPDES as a matter of law because such drainage is a nonpoint source. (Dkt. 60-37 at 19-36). They claim that “the statute is clear that agricultural drainage is not subject to NPDES permitting,” (Dkt. 60-37 at 3, n.19). However, they make only perfunctory reference to the actual statutory texts defining discharges from point sources subject to NPDES permitting and also ignore applicable EPA regulations and IDNR rules that define the sources subject to the NPDES.

Unmoored from the applicable statutory and regulatory texts, Drainage Districts range far afield to draw their conclusion from a complex set of arguments and inferences supposedly drawn from a miscellany of statutory and regulatory references, legislative history, and various

¹¹ The references in Drainage Districts’ Brief at footnote 15 to a discussion of “precipitation” by the EPA in the context of irrigated agriculture in 1976 cannot be said to have triggered the running of any statute of limitations. This reference is at best of highly doubtful applicability to the issue at hand and has in any case been long since overtaken by statutory and regulatory events respecting irrigation issues.

casual sources. They infer there is an unstated and overarching legislative and regulatory intent to exclude themselves and all agricultural drainage.

To properly understand and apply the CWA, one starts with the text. Gwaltney of Smithfield, Ltd., 484 U.S. at 56 (U.S. 1987) (“It is well settled that “the starting point for interpreting a statute is the language of the statute itself.” (internal quotation omitted)). Likewise EPA regulations must be read to mean what they plainly say. Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

The CWA’s “core command,” contained in 33 U.S.C. § 1311(a) prohibits the “discharge of any pollutant” by a “point source” except as authorized by permit. Coeur Alaska, Inc., 557 U.S. at 298-300. The basic definition of point source is found in 33 USC Section 1362(14):

[] any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

This language is repeated by the corresponding EPA Regulation, 40 C.F.R. Section 122.2, with an additional category of point source.¹² The corresponding Iowa statute, Iowa Code Section 455B.171(19), and the corresponding IDNR Rule, Iowa Administrative Code Section 567-60.2,¹³ generally follow their federal counterparts.

However, the definition of “point source” also excludes from its definition two types of point sources that would otherwise meet the definition:

¹² The EPA regulation adds “landfill leachate collection system,” to reflect an un-codified statutory provision enacted by Section 507 of the Water Quality Act. See Pub. L. No. 100-4, 101 Stat 7, 78 (1987); See also Nat’l Pollutant Discharge Elimination Sys. Permit Regulations, 54 Fed. Reg. 246, 247 (EPA Jan., 4 1989).

¹³ There is no federal definition of “nonpoint source” in the CWA or EPA regulations, but IDNR Rules, Iowa Administrative Code Section 567-60.2 defines the term to mean “a source of pollutants that is not a point source”.

This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 USC § 1362(14). The EPA's definition rephrases the exclusions to read as follows:

This term does not include return flows from irrigated agriculture or agricultural storm water *runoff*.

40 C.F.R. § 122.2 (emphasis added); see 40 C.F.R.122.3.¹⁴ The EPA explained that its intent in adopting the rule in its current form after the adoption of the agricultural stormwater exclusion by the WQA in 1987 was simply to “incorporate the statutory exclusion.” Nat'l Pollutant Discharge Elimination Sys. Permit Regulations, 54 Fed. Reg. at 247; see also Nat'l Pollutant Discharge Elimination Sys. Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, 47993 (Nov. 16, 1990) (“[T]he codification rule promulgated the language found at . . .Section 503 of the WQA . . .”).

The Iowa Code definition does not include these exclusions. IDNR Rule, Iowa Administrative Code § 567-60.2, omits the cross reference but was, until an amendment was filed on April 13, 2016, otherwise functionally identical to the EPA regulation.¹⁵

The variations between the texts of the CWA and other sources may reflect nuances of meaning that are of significance in understanding the exclusions at issue here, as will be discussed in Sections VI and VII, infra. However, any such nuances do not affect the first step of the CWA analysis—whether the source constitutes a “discernible, confined and discrete

¹⁴ The cross referenced section excludes various activities from NPDES permitting including “[a]ny introduction of pollutants from nonpoint-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands”. 40 C.F.R. § 122.3(e). Its purpose was explained by the EPA at 54 FR 246 at 247, 1989 WL 274468(F.R.) (Jan, 4 1989).

¹⁵ As of April 13, 2016 the IDNR definition of “point source” has been amended by the EPC to exactly match the CWA wording of the agricultural exclusions—rather than the EPA's wording. 2016 IA Reg Text 413573 (Ns) (West), Iowa Admin. Bull. at 2015-2482 (April 13, 2016). The purpose of this, as stated by the EPC, was to make the definition “equivalent to the definition in the [CWA].” (Minutes of the Env'tl. Protection Comm'n, March 15, 2016, at 10).

conveyance.”

The scope of the term “point source” is intentionally broad and inclusive.¹⁶ It is the essential limiting term in the definition of “discharge of a pollutant” defined at 33 U.S.C. Section 1362(12):

The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from *any point source*, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from *any point source* other than a vessel or other floating craft.

33 U.S.C. § 1362(12) (emphasis added).

EPA regulations take the definition of “discharge of a pollutant” and add additional regulatory gloss to inform the meaning of the term:

Discharge of a pollutant means . . . (b) Any addition of any pollutant or combination of pollutants *to the waters of the “contiguous zone” or the ocean from any point source* other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States *from surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works.*

40 C.F.R. § 122.2 (emphasis added). There is no corresponding definition in the Iowa Code, but IDNR rules adapt the federal language without substantive change and apply it to all waters of the state of Iowa. Iowa Admin. Code r. 567-60.2.

Drainage Districts come within the plain scope of these broad definitions. Pipes and ditches—the exact systems that make up the drainage district infrastructure—are terms specifically included in the CWA’s list of point sources included and repeated verbatim by the

¹⁶ The definition of point source is intended to embrace the broadest possible definition of an identifiable conveyance. U.S. v. Earth Sciences, Inc., 599 F.2d 368, 372 (10th Cir. 1979); Kennecott Copper Corp. v. E.P.A., 612 F.2d 1232, 1243 (10th Cir. 1979) (“Congress has purposefully phrased this definition [point source] broadly. This is as it should be given its contemplated applicability to literally thousands of pollution sources.”).

EPA and Iowa authorities.¹⁷ Moreover, the Record shows the addition of nitrate from the Drainage Districts' pipes and ditches into jurisdictional waters, which satisfies the definition of "discharge of a pollutant." (Pl. Stmt. Add. Facts ¶¶ 28; Droessler Tr. 41:19-70:2 (Pl. App. at 2093); (Pl. App. 252, 253-291)

The scope and interplay of the definitions of "point source" and "discharge of a pollutant" have been addressed in over seventy cases since 1972. See Jeffrey G. Miller, Plain Meaning, Precedent, and Metaphysics: Interpreting the "Point Source" Element of the Clean Water Act Offense, 45 *Envtl. L. Rep. News & Analysis* 11129(2015). The case law has developed a very inclusive definition of "point source." Miller at 11138-39 (identifying cases finding the following to be point source discharges: "airplanes dropping bombs or spraying pesticides; aquacultural facilities; barges; breaks in berms; bulldozers, cranes, dump trucks, loaders, plows, tractors, and other construction and earth-moving equipment; *canals, pumps, and levees*; collection pond and tank cracks, leaks, bypasses, and overflows; Concentrated Animal Feeding Operations ("CAFOs"); construction sites; *dams; ditches*; entire facilities or industrial plants; facilities discharging to POTWs; *fields overflowing with applied manure*; human beings; manure spreaders; mine adits, shafts, pits, and tunnels; mushroom-growing facilities; *overflowing collection and tailings ponds and lagoons*; piles of debris, material, and waste rock; *pipes and hoses*; railway culverts; rifle ranges; septic systems; sluice boxes; spray apparatuses attached to trucks and helicopters; sump overflows; systems for circulating, channeling, or draining stormwater runoff; toilets connected to storm sewers; tank trucks; trucks with attached

¹⁷ The Drainage Districts' Brief includes a Bill Stowe power point slide showing two pipes—one labeled point source and regulated and the other labeled non-point source and non-regulated. They claim Mr. Stowe, thus "admits" they are nonpoint sources. This misstates Mr. Stowe's intent which was, as he explained in his deposition, to illustrate the error of the current treatment of drainage pipes as non-regulated. (Pl. App. at 171, 2290). To the extent the Drainage Districts rely on DMWW supposedly contradicting itself, this is a genuine issue of disputed fact.

spreaders or sprayers; and turbines.” (footnotes omitted) (emphasis added)). Courts have also found that culverts meet the definition of a point source. Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991).

The cases demonstrate the many and varied ways in which the definition of point source as a “discernable, confined and discrete conveyance” has been freely applied. Indeed, DMWW is not aware of a case in which the discharge of a pollutant from an object specifically named in the definition of point source (e.g. pipes, ditches, etc.) has required any significant judicial consideration of whether there was a “point source” under the statutory definition.

The Drainage District pipes and ditches easily come within the plain meaning of the CWA and the EPA regulations, as well as the cases, which have considered the scope of the definition of “point source.” Indeed, they fall well within what one author considers “per se” point sources.¹⁸

In National Wildlife Federation v. Gorsuch, 693 F.2d 156, 165, (D.C. Cir. 1982), the Court distilled the provisions governing discharge of pollution by a point source to five elements: “(1) a *pollutant* must be (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*” (emphasis in original).

The Record shows these elements here: (1) Drainage Districts’ discharge nitrate pollution (Pl. Stmt. Add. Facts ¶ 236; (Pl. App. at 564-567)). (2) this discharge is added to (3) the Raccoon

¹⁸ As stated in Miller at 11139-40: “The definition of ‘point source’ as a ‘discernible, confined and discrete conveyance’ is a straightforward concept that is easy to apply in most factual situations. Its list of examples is long and inclusive, *creating a large set of per se point sources*. . . . Few decisions conduct an in-depth interpretation of point source because ‘any identifiable conveyance’ will suffice. That is not the end of the inquiry, however, since even clear point sources may be subject to a statutory or regulatory exemption” (footnotes omitted) (emphasis added).

River, a navigable water (Pl. Stmt. Add. Facts ¶ 230; (Pl. App. at 252)); (4) from (5) Drainage Districts facilities consisting of pipes and ditches (Pl. Stmt. Add. Facts ¶ 30; Hecht Tr. 51:8-24 (Pl. App. at 2126); Droessler Tr. 30:16-33:15 (Pl. App. at 2091)). This Record establishes a prima facie case unless one of the two exclusions to the definition of point source applies.

With this baseline—Drainage Districts are point sources under the CWA—the analysis shifts to whether one of the two applicable exclusions remove Drainage Districts from the definition of the NPDES permit system. For the reasons set forth in Sections VI and VII, *infra*, neither the exclusion for “irrigation return flow” nor “agricultural stormwater discharges” apply.

VI. The “Irrigation Return” Exclusion Does Not Apply to the Drainage Districts

The second sentence of 33 USC § 1362(14) provides an exclusion from the general definition of “point source” for “return flows from irrigated agriculture”. Although this provision is referred to at various points by the Drainage Districts, it has no direct application to this case. (Dkt. 60-37 at 23-27, 29-30, 35).

The exclusion was considered in Fishermen Against Destruction of Env’t, Inc. v. Closter Farms, Inc., 300 F.3d 1294 (11th Cir. 2002). (All return flows arising from a process of “flood irrigation” exempt.) It has also been most recently addressed in a trio of opinions in a case in the Eastern District of California: Pac. Coast Fed’n of Fishermen’s Ass’s v. Murillo, 2014 WL 1302102 (E.D. Cal. 2014); Pac. Coast Fed’n of Fishermen’s Ass’s v. Glaser, 2013 WL 5230266 (E.D. Cal. 2013); Pac. Coast Fed’n of Fishermen’s Ass’s v. Glaser, 2012 WL 3778963 (E.D. Cal. 2012).

As explained in Pacific Coast Federation of Fishermen’s Associations v. Glaser, (2012), the irrigation exclusion was added to the definition of point source in the CWA by the 1977 Act after court cases and various iterations of EPA regulations would have resulted in the application

of NPDES permitting requirements to irrigated agriculture. 2012 WL 3778963, at *5. Congress reacted by providing a statutory exclusion for all irrigation return flows from the definition of point source, and coupled this with a specific direction to the EPA:

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

33 USCA § 1342(l)(1).

As later explained in Pacific Coast Federation of Fishermen's Associations v. Glaser, (2013):

[T]he plain meaning of the term “irrigated agriculture” does not contemplate any type of discharge at all; it simply refers to a noun, agriculture, which covers crops. That noun is modified by the adjective “irrigated,” which means watering using artificial means. The farmland in question is used to grow crops and those crops are irrigated.

2013 WL 5230266, at *8.

However, the district court ultimately ruled that the exclusion would not apply to the extent of discharge of “retired land that no longer supports irrigated agriculture.” Pac. Coast Fed'n of Fishermen's Ass's v. Murillo, 2014 WL 1302102, at *4.

The irrigation return flow exclusion does not apply to this case at all because the Record explicitly shows that no irrigation flow is involved here. (Pl. Stmt. Add. Facts ¶ 60; Hecht Tr. 81:14-16 (Pl. App. at 2134)).

However, the express provision for the exclusion of irrigation return flows and agricultural stormwater discharges imply that other, unmentioned kinds of agriculturally-related systems are not excluded if they otherwise meet the definition of a point source, as Drainage District do here. See Sierra Club v. E.P.A., 551 F.3d 1019, 1028 (D.C. Cir. 2008) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of a contrary legislative intent.” (citations omitted)).

VII. The “Agricultural Stormwater” Exclusion Does Not Apply to Drainage Districts

The second sentence of 33 U.S.C § 1362(14) provides an exclusion from the definition of “point source” for “agricultural stormwater discharges.” The meaning of this exclusion gives rise to the principle issue to be decided in this case—an issue that cannot be decided on this motion because disputed facts must be resolved under a properly understood meaning of the exclusion.

A. The meaning of the terms “agricultural stormwater discharges” does not support application of the exclusion to the facts of this case.

Application of the agricultural stormwater discharges exclusion to this case is complicated by the fact that the CWA, EPA, and IDNR do not define, and have never explained, the term.¹⁹ The Parties’ experts agree that the term has no scientific or engineering definition. (Pl. Stmt. Add. Facts ¶ 112; Burkart Tr. 22:22-24:18 (Pl. App. at 2022); Burkart Tr. 245:10-246:19 (Pl. App. at 2042); Sands Tr. 142:25-143:25 (Pl. App. at 2210); Sands Tr. 201:1-17 (Pl. App. at 2224); (Pl. App. at 1052); Dahlstrom Tr. 37:2-16 (Pl. App. at 2067); Dahlstrom Tr. 89:25-91:5 (Pl. App. at 2073); Dahlstrom Tr. 131:25-132:7 (Pl. App. at 2076); (Pl. App. at 1368-1371, 1376)). Nevertheless, the Court’s analysis is not left without an analytical framework. First, the constituent parts of the statutory language have plain meaning that the Court can apply. Second, the EPA regulations inform the application of the plain meaning of the statutory terms. Finally, application of the plain meaning to the facts demonstrates that there are genuine issues of material fact as to the applicability of the exclusion in this case.

1. The plain meaning of the words “agricultural stormwater discharges” does not include the discharge of groundwater.

As previously noted, the starting point for analysis of any statute is the text of the statute

¹⁹ In most NPDES cases there is some clearly articulated regulatory position applicable to the specific facts that may be considered by the Court. See e.g. Decker, --- U.S. ---, 133 S.Ct. at 1335 (2013). There is nothing like that here.

itself. Gwaltney of Smithfield, Ltd., 484 U.S. at 56. Unless otherwise defined, statutory terms are interpreted in accordance with their ordinary meaning. Sebelius v. Cloer, --- U.S. ---, 133 S.Ct. 1886, 1893 (2013). As a result, the initial consideration here must simply be the ordinary meaning of the words used as understood by application of common sense. See First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 869 (4th Cir.1989) (stating that common sense is the “most fundamental guide to statutory construction”), *cert denied*, 493 U.S. 1070 (1990). Since the full term at issue is not in common use, but the constituent words are, these rules mean that the constituent words “agricultural”, “stormwater”, and “discharge” should be defined using common sense and plain meaning.

A fair dictionary definition of the word “agricultural” is “of or pertaining to agriculture...” with “agriculture” defined as “the science and art of cultivating the soil, including the allied pursuits of gathering in the crops and rearing live stock, tillage, husbandry, farming (in the widest sense).” Oxford English Dictionary 267 (2d Ed. 1989); see also Waterkeeper Alliance, Inc. v. E.P.A., 399 F.3d 486, 509 (2d Cir. 2005) (Applying the O.E.D. definition.); Pac. Coast Fed’n of Fishermen’s Ass’s v. Glaser, 2013 WL 5230266, at *8 (Stating the noun “agriculture” includes “crops”).

The second term “stormwater”²⁰ is defined as “an abnormal amount of surface water resulting from a heavy fall of rain or snow” Oxford English Dictionary 795 (2d Ed. 1989). In addition, the stem word “storm” is defined as “a violent disturbance of the atmosphere, manifested by high winds, often accompanied by heavy falls of rain, hail, or snow, by thunder...” *Id.* at 793; see also Waterkeeper Alliance, Inc., 399 F.3d at 509 (Connecting the term

²⁰ As noted by the Drainage Districts, Congress uses the term “stormwater”, whereas EPA’s regulations refer to “storm water”. DMWW agrees that these terms are interchangeable and also notes that the distinction arose simply by application of a GPO style manual. Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990 at 47997.

stormwater to runoff that was “primarily the result of ‘precipitation.’”); Concerned Area Residents for the Env’t v. Southview Farm, 834 F. Supp. 1422, 1428 (W.D.N.Y. 1993), *rev’d on other grounds*, 34 F.3d 114 (2d Cir. 1994), *cert. denied*, 514 U.S. 1082 (U.S. 1995) (Connecting the term stormwater to runoff that “drain[s] over terrain”).

The third term “discharge” is defined as “the act of sending out or pouring forth; emission, ejection; the rate or amount of emission”. Oxford English Dictionary at 732 (2d Ed. 1989); see also S.D. Warren Co. v. Maine Bd. of Env’l Protection, 547 U.S. 370, 376 (2006) (“When it applies to water, ‘discharge’ commonly means a ‘flowing or issuing out.’”).

The statutory combination of these three words into a terse, and otherwise undefined, exclusion, has the effect of requiring that all three words must apply before the exclusion applies. Although both “agricultural” and “discharge” may have broadly inclusive definitions, the word stormwater considerably narrows the scope of the exclusion and certainly negates any assertion that all agricultural drainage is excluded. In particular the common understanding of “storm” and “stormwater” support the idea that the word stormwater as used in the exclusion is limited to flow directly from, and in immediate temporal proximity to, a storm event. It is runoff that is not absorbed by the soil, but rather moves across the surface of the land. This does not include the groundwater that carries nitrate pollution.

Viewed from a plain meaning perspective the Record establishes evidentiary facts that are more than sufficient to give rise to issues of ultimate fact for trial on the question of whether the exclusion applies.

2. EPA definitions of “stormwater” and “discharge” also show that the discharge of polluted groundwater is outside the exclusion.

Neither the EPA nor IDNR has defined the meaning of “agricultural stormwater discharges” by regulation or rule. Moreover, no agency guidance has been issued on the meaning

of the exclusion. The EPA, and others, regularly refer to the exclusion, but only by repeating its words.

However, the EPA has defined two of the constituent words, “discharge” and “storm water” in its NPDES definitions. The term “discharge” is defined at 40 C.F.R. § 122.2 as follows: “Discharge when used without qualification means the ‘discharge of a pollutant.’” The EPA then defines storm water in 40 C.F.R. § 122.2 by cross referencing the definition in 40 C.F.R. § 122.26(b)(13) which provides: “Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage.”

The EPA’s definition of “storm water” is consistent with the plain meaning and common understanding of the term, but also illuminates important issues here in several ways.

First, the definition confirms the significance of runoff to the scope of the exclusion. In this regard it should be noted that the EPA’s definition of the term “point source” translated the exclusion from “agricultural stormwater discharges” to “agricultural stormwater runoff.” The uses of runoff in both the definition of “point source” and definition of “stormwater” confirm that the EPA interpreted the scope of the “agricultural stormwater discharges” exclusion as limited to runoff. *Compare* 33 USC § 1362(14) *with* 40 C.F.R. § 122.2.

Second, the last of the three categories of storm water listed by the EPA is “surface runoff and drainage.” The mention of drainage modified by the word “surface” has particular salience here because of the dual role Drainage Districts play—both to surface drainage of storm water and subsurface drainage ground water. Under this understanding the surface drainage role is exempt stormwater discharge, but the subsurface drainage of groundwater is not.

The history of the EPA’s definition of storm water is also significant. When the EPA first issued notice of rulemaking for storm water discharges after the WQA was enacted, it requested

comment on a definition of storm water that included:

“storm water runoff, surface runoff, street wash waters related to street cleaning or maintenance, *infiltration* (other than infiltration contaminated by seepage from sanitary sewers or by other discharges) and *drainage related to storm events or snow melt.*” (emphasis added).

Permit Application Regulations for Storm Water Discharges, 53 Fed. Reg. at 49427. The rule as finally adopted excluded any mention of “infiltration” and rephrased the use of drainage. Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990 (Nov. 16, 1990). The EPA explained:

In today’s rule, the definition of storm water excludes infiltration since pollutants in these flows will depend on a large number of factors, including interactions with soil and past land use practices at a given site. Further infiltration flows can be contaminated by sources that are not related to precipitation events, such as seepage from sanitary sewers. Accordingly the final regulatory language does not include infiltration in the definition of storm water. Such flows may be subject to appropriate permit conditions in industrial permits.

...

A commenter wanted clarification of the terms “other discharges” and “drainage” that are used in the definition of “storm water.” As noted above, today’s rule clarifies that infiltration is not considered storm water. Thus the portion of the definition of storm water that refers to “other discharges” has also been removed. However, the term drainage has been retained. “Drainage” does not take on any meaning other than the flow of runoff into a conveyance, as the word is commonly understood.

The EPA’s exclusion of the word “infiltration” from the final regulatory definition and the ultimate treatment of drainage as related to surface drainage demonstrates an intent to distinguish stormwater running off the land from water that infiltrates into the ground, and that subsurface drainage conveying groundwater does not fit within the regulatory understanding of “storm water” or “agricultural stormwater discharges”. The conversion of the words “drainage related to storm events or snow melt” to “surface... drainage” is of similar import and effect.

The cross-reference to the definition of “storm water” in 40 C.F.R. Section 122.2 and the

EPA's definition of "discharge" in 40 C.F.R. Section 122.2, which includes only a polluted discharge, are both consistent with the distinction drawn by DMWW between surface runoff and groundwater. Surface water runoff from agricultural lands is largely free of nitrate and ground water is heavily polluted by nitrate. (Pl. App. at 0894- 0895). The focus on the discharge of pollution as the regulatory event means that any polluted discharge without a permit that does not meet the test for exclusion is a violation. In other words, even if a facility has discharges that are excluded, if it also has *any* un-excluded discharges it needs a permit. See, e.g., Pac. Coast Fed'n of Fishermen's Ass's v. Murillo, 2014 WL 1302102.

3. The facts of this case preclude application of the "agricultural stormwater discharges" exclusion.

The Record includes substantial evidence, some disputed, but much undisputed, that the discharge of nitrate arises from groundwater, not stormwater. The experts agree that subsurface drainage conveys nitrate. (Pl. Stmt. Add. Facts ¶ 144-147; Skopec Tr. 21:2-8 (Pl. App. at 2244); Skopec Tr. 30:15-32:21²¹ (Pl. App. at 2246); Skopec Tr. 74:23-75:8 (Pl. App. at 2256); Skopec Tr. 151:9-152:13 (Pl. App. at 2268); Corrigan Tr. 74:22-75:12 (Pl. App. at 2056); Sands Tr. 181:19-182:1 (Pl. App. at 2219); Sands Tr. 183:10-18 (Pl. App. at 2219); Sands Tr. 199:20-200:2 (Pl. App. at 2223); (Pl. App. at 643, 896, 913, 922, 929-930, 1108, 1119, 1121 1192, 1371, 1374-1375)). They disagree as to the characterization of the highly nitrate-laden water conveyed by Drainage District pipes and ditches. DMWW's experts distinguish groundwater from stormwater. See (Pl. App. at 890-949, 1025-1106, 1363-1385). The Drainage Districts and their experts either equate or connect all groundwater to stormwater. See (Pl. App. at 1025-1106). The

²¹ Drainage Districts' counsel's standing objection to Dr. Skopec's testimony is unfounded. Dr. Skopec is qualified to offer opinions rationally based on her perceptions, Fed. Evid. 701, and opinions based on sufficient facts and data, reliable methods, and reliable application of those methods, Fed. R. Evid. 702. Sufficient foundation to substantiate her testimony exists in the summary judgment Record, and can also be established at trial.

degree and timing of nitrate discharge to storm events is contested. See (Pl. App. at 1025-1106).

B. The statutory context of the exclusion shows surface runoff to be required for the exclusion to apply.

Although the statutory text of the agricultural stormwater discharges exclusion and the EPA's regulations are clear and this Court need not look beyond them, the context surrounding the enactment of the exclusion is useful to understanding the purpose and meaning of the exclusion.

The exclusion was enacted by the WQA, as a part of a major revision to the CWA which included a comprehensive regulatory scheme for municipal and industrial storm water systems. This legislation also articulated specific limited exclusions from NPDES permitting.

But for the exclusion of agricultural stormwater discharges, all stormwater from farms might have been drawn into an expanded system intended to impose new requirements for municipal and industrial storm water systems. A purpose to avoid such result was inferred in Southview Farm, 34 F.3d at 120 as:

The [Agricultural Stormwater Discharges] exemption at issue was added by the Water Quality Act of 1987, Pub.L. No. 100-4 § 503, 101 Stat. 7, 75 (1987). Because Congress mandated comprehensive regulations of certain forms of industrial and municipal stormwater run-off under 33 U.S.C. § 1342(p), one can infer that Congress wanted to make it clear that agriculture was not included in this new program.

The EPA's Federal Register publications proposing and adopting regulations under the WQA show a complex set of rules governing a permitting system for regulation of surface runoff of storm water. See, e.g., Nat'l Pollutant Discharge Elimination Sys. Permit Regulations 55 Fed. Reg. 47990, (Nov. 16, 1990); Nat'l Pollutant Discharge Elimination Sys. Permit Regulations, 54 Fed. Reg. 246, (Jan, 4 1989); Nat'l Pollutant Discharge Elimination Sys. Permit Application Regulations for Storm Water Discharges, 53 Fed. Reg. 49416, 1988 WL 267061 (Dec. 7, 1988). The only attention to groundwater and subsurface drainage was to not consider such flows to be

within the scope of the stormwater program, as previously discussed. The inference to be drawn from these implementing regulations is that the agricultural stormwater discharges exclusion should apply to surface runoff of stormwater and not to groundwater drainage. Since the Record here shows polluted discharges from the Drainage Districts are groundwater, the exclusion does not apply.

The statutory context also reveals that another purpose of the stormwater exclusion must have been to resolve the long running controversy arising from the EPA's decision in 1973 to exempt agriculture and certain other sources from the NPDES system, with certain defined exceptions. See Permit Application Regulations for Storm Water Discharges, 53 Fed. Reg. at 49419; see also Natural Res. Def Council, Inc. v. Train, 396 F. Supp. 1393 (D.C. 1975), *affmd sub nom* Natural Res Def Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) (Invalidated a broad set of exclusions of point sources from the NPDES as adopted by the EPA by regulation in 1973, codified as 40 C.F.R. Section 124.11., and referenced at footnote 3 and quoted at length in footnote 5).

Most pertinently, the 1973 EPA regulations broadly excluded “[d]ischarges of pollutants from agricultural and silvicultural activities, including irrigation return flow and runoff from orchards, cultivated crops, pastures, rangelands ... [enumerated exceptions excluded]²².” Form and Guidelines Regarding Agric. and Silvicultural Activities, 38 Fed. Reg. 18000, 18003 (July 5, 1973). After the 1973 rule was declared invalid, the 1977 Act was amended to exclude irrigation return flow. Then, when the enhanced regulation of storm water was mandated by the WQA in 1987, the storm water exclusion completed the reconciliation of the conflicting views respecting

²² The exceptions to the exemption included detailed provisions covering certain large CAFOs and irrigations systems, thus re-including some agricultural sources as originally contemplated by the 1972 Act. The exception refers to “tile drainage”, but only in the context of the large irrigation systems that were to require NPDES permits.

agriculture. The end result replaced the original blanket exemption of all agricultural sources, with two specific exceptions. The resulting statute had a blanket inclusion of all agricultural points sources, subject to two explicitly stated exclusions for agricultural irrigation and stormwater. This is contrasted with the blanket exemption for agriculture with limited enumerated inclusions that had originally been provided in the 1973 Regulations.

Applying all of these contextual lessons confirms what a plain reading shows—stormwater does not include polluted groundwater drained by a drainage district.

C. The case law shows that the exclusion does not apply to Drainage Districts' nitrate discharge.

The case law concerning the agricultural stormwater discharges exclusion is very limited, and no case has addressed the applicability of the exclusion to agricultural subsurface drainage.

However, there is a case that has addressed nutrient pollution by flow of groundwater within a major system of public works. Fishermen Against Destruction of Env't, Inc., 300 F.3d at 1297-98. In that case Court ruled:

Evidence established that the sources of the water being pumped into Lake Okeechobee are: (1) rainfall, (2) groundwater withdrawn into the canals from the areas being drained, and (3) seepage from the lake. The determination that the discharged rainwater is “agricultural stormwater discharge” is a reasonable one.

...

We also conclude that the discharged groundwater and seepage can be characterized as “return flow from irrigation agriculture.” The canals are used to irrigate Closter Farms’s sugar cane farm through the process of “flood irrigation,” in which water is forced into the sugar cane fields by raising the water levels in the canals. All of the water that has seeped into the canals from Lake Okeechobee, either above or below ground, has been used in the irrigation process and therefore discharging it back into the lake is a “return flow.”

The facts presented in this case and the Circuit Court’s findings are significant. In its consideration of whether discharge of rainwater was within the meaning of “agricultural stormwater discharges” the court held that it was. However, the Court did not apply the

stormwater exclusion to the discharge of groundwater and seepage. Rather, only the irrigation return flow exemption was applied to groundwater and seepage. If the Court had considered the “agricultural stormwater discharges” exclusion applicable to groundwater discharges, it surely would have said so.

There are also two cases which reach conflicting results with respect to pollution caused by stormwater surface runoff of manure generated by CAFO’s. Compare Southview Farm, 34 F.3d 114 with Alt v. E.P.A., 979 F. Supp. 2d 701 (N.D. W.Va. 2013).

These cases involve the interplay between the express inclusion of CAFOs as point sources and the agricultural stormwater discharges exclusion. The cases consider stormwater to be surface runoff. Southview Farm, 34 F.3d at 121 (“water runoff flowing off the field”); Southview Farm, 834 F. Supp. at 1428 (Stating that “runoff” has been defined by the Court of Appeals for the District of Columbia Circuit as “wastewaters generated by rainfall that drain over terrain into navigable waters” (quoting Costle, 568 F.2d at 1377)); Alt 979 F. Supp. 2d at 704 (“Precipitation has fallen on Ms. Alt’s farmyard, where it contacted the particles, dust and feathers from the confinement houses, creating runoff that carried such particles, dust and feathers across a neighboring grassy pasture and into Mudlick Run”). Again, surface runoff is different than groundwater.

Drainage Districts make much of the discussion in these cases concerning the relationship of the discharge of pollution to precipitation events, but these cases do not consider the issue of groundwater which is central to this case. Moreover, if the relationship to precipitation is the issue to be decided here, this is an issue of disputed fact on this Record.

Thus, the limited case law supports the position that the exclusion does not apply to the Drainage District’s discharge of nitrate.

D. Drainage Districts are not farms and have more resemblance to undisputed point sources than to agricultural activity.

Another issue to be considered is whether the character of the discharges at issue here are sufficiently “agricultural” to be within the exclusion. The Drainage Districts are not engaged in farming, in the sense of crop production or raising livestock. Rather they support farming by providing a public service that promotes agriculture within their boundaries. In that respect the Drainage Districts resemble institutions such rural electric co-ops and farm to market road systems in form and purpose. In terms of physical make-up and impact on water quality they resemble other public government utilities such as sanitary and storm sewer systems more than they resemble farms. Drainage Districts also provided a non-agriculture related service by draining roads and highways. (Pl. Stmt. Add. Facts ¶ 87; Hecht Tr. 15:9-22 (Pl. App. at 2118); Hecht Tr. 18:7-14 (Pl. App. at 2119); (Pl. App. at 539)).

In at least one case, the relationship to farming was simply not strong enough to apply an “agricultural” exclusion. U.S. v. Frezzo Bros., Inc., 546 F. Supp. 713, 718 (E.D. Pa. 1982) (mushroom composting is not agricultural, within then applicable EPA exemption), *aff’d*, 703 F.2d 62 (3d Cir. 1983) (per curiam), *cert. denied*, 464 U.S. 829 (1983).

Placing the issue in context here, it would be quite possible to conclude that discharges of nitrate by farms and farmers are excluded from regulation, but discharges by Drainage Districts are still required to obtain NPDES permits because they are exactly the kind of large scale infrastructure which is within the heart of the purpose of the NPDES system. Such a conclusion would allow the court to distinguish individual farmer field tiles from this case. This is something that can only be addressed by a full factual determination.

Thus, for all of the foregoing reason the Court should conclude that issues of material fact preclude summary judgment on the agricultural stormwater exclusion.

VIII. Drainage District Pipes and Ditches are not “Nonpoint” Sources

Drainage Districts devote the majority of their Brief to the proposition that all agricultural drainage sources, including their pipes and ditches, are “nonpoint” sources of pollution under the CWA as a matter of law.

The nonpoint argument is contrary to the plain meaning of the CWA definition, the EPA regulations and IDNR rules, and the EPA’s informal definition of nonpoint source as understood by the Courts. The argument is also not truly supported by the statutory, legislative and regulatory history proffered by Drainage Districts.

No amount of argumentative alchemy, and no magic word, be it “abracadabra” or “agriculture”, can transform a statutory point source—a polluting pipe or a polluting ditch into an unregulated nonpoint source. This not to say that the terms of an exclusion cannot be applied, if appropriate, but this is not the gist of the Drainage Districts’ main argument. Rather, all agricultural drainage is erroneously said by the Drainage Districts Brief to be nonpoint.

A. The plain statutory distinction between point sources and nonpoint sources is dispositive here.

The claim that all agricultural drainage is nonpoint source contradicts the plain text of the applicable statutory and regulatory provisions when applied to pipes and to ditches discharging pollution.

Under the basic structure of the CWA, pollution that is conveyed by a pipe, ditch, channel or other discrete conveyance is a point source of pollution and subject to permitting. The most basic rule to be applied in any statutory construction case is that the plain meaning of a statute governs, as understood from the ordinary meaning of the words of its text. Cloer, --- U.S. ---, 133 S.Ct. 1886, 1893 (2013). Drainage Districts ignore this rule when they claim their pipes and ditches are not within the meaning of the governing point source definition. If there was

some textual ambiguity or other textual enigma, then other factors such as legislative history or regulatory interpretation might come into play. These cannot, however, flatly contradict the unambiguous text of a statute as written. See e.g. U.S. v. Otuya, 720 F.3d 183, 190 (4th Cir. 2013) (“Arguments about purpose, history, and statutory titles cannot contradict a law’s plain text”).

B. The regulatory meaning of “nonpoint source” excludes the Drainage Districts.

The term nonpoint source is not defined by statute, but is used within the CWA as a residual term to cover sources that are *not* a point source. The ordinary grammatical meaning of nonpoint source is simply a source that is not a point source.

The EPA regulations do not define nonpoint source either, but the EPA has provided a definition of nonpoint source on its informational website explaining nonpoint sources:²³

The term “nonpoint source” is defined to mean any source of water pollution that does not meet the legal definition of “point source” in section 502(14) of the Clean Water Act.²⁴

Iowa has essentially the same legal definition of nonpoint source, which the EPC has adopted as a rule. See Iowa Admin. Code r. 567-60.2 (defining nonpoint source as “a source of pollutants that is not a point source.”).

Thus, as a legal matter, the definition of point source controls the meaning of nonpoint

²³ Drainage Districts ignore this definition and quote another part of the website that provides a generalized description, as opposed to a definition, of nonpoint sources to include “[L]and runoff, precipitation, atmospheric deposition, drainage, seepage or hydrologic modification.” Drainage Districts claim this explanation and general description shows that the EPA considers drainage of groundwater to be a non-point source. The explanation does mention “drainage and “seepage” but also goes on to refer to “many diffuse sources,” which drainage districts are not. Drainage Districts are collected and channeled sources.

²⁴ EPA, What Is Nonpoint Source Pollution?, *available at* <https://www.epa.gov/polluted-runoff-nonpoint-source-pollution/what-nonpoint-source>

source. This regulatory concept is also consistent with the cases. See, e.g., S. Florida Water Mgmt Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, (2004); Southview Farm, 34 F.3d 114; U.S. v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir.1978).

The clarity of this understanding may have been confused for some by an ambiguous definition of Nonpoint Source (NPS) Pollution in an EPA formal guidance document entitled “Nonpoint Source Guidance” that ties the definition of nonpoint source to sources that are not regulated. The Guidance states:

For the purpose of implementing the NPS provisions in the CWA, NPS Pollution is defined as follows:

Nonpoint Source (NPS) Pollution: NPS pollution is caused by diffuse *sources that are not regulated as point sources* and normally is associated with agricultural, silvicultural and urban runoff, runoff from construction activities, etc. . . . It must be kept in mind that this definition is necessarily general; legal and regulatory decisions have sometimes resulted in certain sources being assigned to either the point or nonpoint source categories because of considerations other than their manner of discharge. For example, irrigation return flows are designated as “nonpoint sources” by section 402(1) of the Clean Water Act, even though the discharge is through a discrete conveyance.

EPA, Office of Water, Nonpoint Source Guidance, at 3 (1987) (emphasis added).

Notable features of this definition are its purpose of implementing “NPS” provisions of the CWA, and its definition that NPS pollution means “sources that are not regulated as point sources.” This definition is ambiguous and might be read to use the words “not regulated” to either mean not regulated because not a point source or to mean not regulated because not, in fact, permitted. This may have sown some confusion of the kind noted by the EPA:

Although assessments of water quality are difficult to perform and verify, several national assessments of water quality are available. For the purpose of these assessments, urban runoff was considered to be a diffuse source or nonpoint source pollution. From a legal standpoint, however, most urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program.

Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990.

In any case, and whatever may have been the EPA's intent in issuing the Guidance, it can have no effect in restricting the scope of the NPDES program because it is intended as Guidance to the NPS program and thus is inapplicable. It certainly cannot serve to contradict the plain statutory meaning of "point source". It may explain confusion in use of the term, nonpoint source.²⁵

C. The Drainage Districts seek to conflate all agricultural drainage with runoff.

Drainage Districts attempt to show that all agricultural drainage is a nonpoint source by misapplying the rules governing "runoff" of stormwater from the surface of the land to pollution arising from groundwater flows of the Drainage Districts. See, e.g., Southview Farm, 34 F.3d at 121 (The court rejected the argument that all agricultural activities are "nonpoint sources" because a point source was found to be involved).

Runoff is a significant source of water pollution and consists of both point and nonpoint sources. Virtually all significant nonpoint sources of pollution involve runoff. See, e.g., Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 220-21 (2d.Cir. 2009) (discussing runoff). By contrast, there are point sources such as storm sewers that convey runoff, but there are also many other point sources of pollution that do not involve runoff. The most obvious example is wastewater from an industrial point source which is a point source that does not involve runoff. Nitrate laden groundwater discharged by the Drainage Districts is another example of point source pollution that does not involve runoff.

²⁵ The NPS definition as a source not permitted is, for example, used in IDNR documents such as the Iowa Nutrient Reduction Strategy.

Some courts, particularly if confronted with a case involving some difficult issue of whether there is a discharge of pollution by a point source, have examined the idea of a nonpoint source as applied by the EPA regulations to runoff as an exemplar. Indeed they may do this even if no runoff is involved under actual facts being considered.²⁶ See, e.g., Cordiano, 575 F.3d at 220-21; U.S. v. Plaza Health Labs., Inc., 3 F.3d 643, 653 (2d. Cir. 1993); Trs. for Alaska v. E.P.A., 749 F.2d 549, 558 (9th Cir. 1984).;

In such cases, the line between point and nonpoint as applied to runoff is typically made by reference to the definition of discharge of pollutant. As stated in Cordiano:

The definition of “Discharge of a pollutant” includes “additions of pollutants into waters of the United States from: surface runoff *which is collected or channelled by man.*” 40 C.F.R. § 122.2. By implication, surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and consequentially is not subject to the CWA permit requirement.

575 F.3d at 221 (emphasis in original).

Applying this discussion as a general principal here, there can be no regulatory basis for concluding that all agricultural drainage is nonpoint. Rather it depends, ultimately, on applying the definitions of “point source” and “discharge of a pollutant” to each case, and usually on whether the source is collected or channeled by man. Agricultural drainage in general, and these Drainage Districts in particular, involve discharges that are by their very nature collected or channeled by man, and thus are point sources.

D. As a matter of history not all agricultural drainage is nonpoint source.

The Drainage Districts argue that all agricultural drainage has always been considered by

²⁶ It is important to note that agricultural runoff and agricultural drainage are by no means synonymous terms. Agricultural drainage fits into the runoff picture to the extent it drains surface runoff, but is outside this picture to the extent it is conveying something else, such as groundwater. The Drainage Districts inaccurately conflate drainage of surface runoff with other drainage throughout their argument.

Congress, the EPA, and perhaps the world at large, to be a nonpoint source. This is just not factually true.

DMWW does not argue that any resort to legislative history is needed to define the unambiguous terms used in the CWA. However, as a counterfactual to the Drainage Districts' assertion that agricultural drainage has always been considered a nonpoint source, perhaps a brief diversion into legislative history may be indulged.

The dichotomy between point and nonpoint sources, as applied to agriculture, was specifically discussed and considered as a part of the legislative process leading up to the 1972 Act. This history featured comments and colloquy between Senator Muskie of Maine and Senator Dole of Kansas discussing the demarcation between point and nonpoint sources as applied to agriculture. The bottom line for agricultural point sources according to Sen. Muskie was:

If a man-made drainage ditch, flushing system or other such device is involved and if measurable waste results and is discharged into water, it is considered a "point source."

See the entirety of Senator Dole's comments and Sen. Muskie's responses which are available at 2 A Legislative History of the Water Pollution Control Act Amendments of 1972 at pp 1292-1299. (Pl. App. at 2294-2302); See also Miller, 45 Env'tl. L. Rep. News & Analysis, at 11131-34.

This history is an uncertain guide for the fine points of meaning of the CWA, but it does show a contemplation that some agricultural sources would be point sources from the inception of the CWA, which is contrary to the narrative offered by Drainage Districts.

Furthermore, in the finally adopted 1972 Act, in the 1977 Act, and in the WQA in 1987, agricultural sources were extensively considered and specific provisions were enacted. The ultimate outcome was statutory inclusion of CAFOs by the 1972 Act, the enactment of the

irrigation return flow exclusion by the 1977 Act, and the enactment of the agricultural storm water discharge exclusion by the WQA in 1987.

These statutory texts, which address the topic of point source as applied to agriculture must be taken to say what they mean. To imply the existence of total drainage exclusions not expressed in the statute is to ignore the text as enacted. See Cordiano, 75 F.3d at 221 (the mention of one thing implies the exclusion of the other). As future Justice Blackmun stated while on the Eighth Circuit bench “[I]f the Congress intended to provide additional exceptions, it would have done so in clear language.” Petteys v. Butler, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, dissenting).

This inference is strongly confirmed by the EPA decision to adopt definitional rules that mostly repeat the statutes, and by the EPC’s recent articulation of that exact purpose. (Pl. App. at 2306-2307). If some essential implied meaning was missing from the statute, surely some regulatory provision would have addressed it.

The Drainage Districts’ argument that the motivating intent of the 1977 Act’s provisions for irrigated agriculture was to provide equality of treatment between irrigated and non-irrigated agriculture and therefore the WQA, some ten years later, meant to exclude subsurface drainage of non-irrigated agriculture by parity of meaning with the 1977 exclusion is speculative and unfounded for several reasons. First, there is no evidence to support such a consistency of logic, understanding, and rationale across different Congresses separated by a decade. Moreover, if consistency and equality was the intent, then surely the WQA enactment in 1987 would have made the same three provisions as made in 1977. Since it did not, the only fair inference is that different treatment was intended in 1987. The 1977 and WQA exclusions are separate provisions, each with a distinct meaning that stands alone.

The Drainage Districts' argument that all agricultural drainage is excluded nonpoint discharge is to replace the actual text used with a broader idea covering *all* agricultural discharges without limit. The words used in the statute do not say that, and cannot be made to mean that.

E. The provisions of the CWA concerning nonpoint source programs are not relevant.

The Drainage Districts make much of references to nonpoint pollution contained in provisions of the CWA outside the point source arena in an effort to show that all agricultural drainage is nonpoint. These efforts take isolated snippets of provisions out of context. In particular Drainage Districts cite three provisions of the CWA, none of which address drainage districts nor defines nonpoint sources, as support that all agricultural drainage is implicitly a nonpoint source. Specifically, the Drainage Districts argue that Section 208(b)(2)(F) of the CWA , 33 U.S.C. Section 1288(b)(2)(F), Section 303 of the CWA, 33 U.S.C. Section 1313(d), and 304(f) of the CWA 33 U.S.C Section 1314(f) evince a supposed Congressional intent to exclude all agricultural runoff and all agricultural drainage whether or not consisting of runoff from the scope of the definition of point source.

The Courts have rejected this kind of logic. See Miccosukee, 541 U.S. at 106 (Addressing flow diversion facilities under Section § 304(f) did not make them nonpoint sources, “if they *also* fall within the ‘point source’ definition.”); see also Pronsolino v. Nastri, 291 F.3d 1123, 1137-38 (9th Cir. 2002); Southview Farm, 34 F.3d 114; Earth Sciences, 599 F.2d at 372. ;

This conclusion can also be reached by consideration of the reason for inclusion of 33 U.S.C. Section 128(b)(2)(F) to Section 208 at the time the irrigation exclusion was enacted by the 1977 Act. The inclusion of such systems in the Section 208 program does not show that all agricultural systems are nonpoint sources, nor does it show that there is no difference between

surface and subsurface flows. Rather, the decision to direct the problem of pollution by irrigation flow into the Section 208 program shows only that excluded point sources may be directed into nonpoint source programs. See S. Rep. No. 95-370, at 35 (1977) (App at 383). Such actions are not, in the end, definitional to statutory point sources.

IX. There Is No Definitive Administrative Guidance Excluding All Agricultural Drainage or Otherwise Addressing the Issues Here

Cases under the CWA sometimes turn on the degree of deference to be afforded to EPA regulations, interpretations and pronouncements. See, Decker, --- U.S. ---, 133 S.Ct. at 1337-38. The Supreme Court has created a sliding scale of deference to an agency's legal conclusions based on the nature of the conclusion and the subject-matter the agency is interpreting. See Auer v. Robbins, 519 U.S. 452 (1997); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

Chevron articulated a two-step analysis for determining whether a court should defer to an agency's understanding of the meaning of a statute as expressed by agency regulations. First, the court should determine whether Congress spoke clearly on the precise question at issue. If not, then the question becomes whether the agency's construction of the statute is permissible. Chevron, 467 U.S. at 842-43 Agencies are charged with administering statutes, and sometimes this requires agencies to fill in gaps. Id. at 843. Courts should not interfere with these decisions unless they are arbitrary, capricious, or an abuse of discretion.

In this regard, the Supreme Court has said that “[w]hen an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation.” Decker, --- U.S. ---, 133 S.Ct. at 1337 (internal citations omitted). Thus, an agency's explanation of the meaning of its own regulation is entitled to respect so long as it is not plainly erroneous. Auer, 519 U.S. at 461. So-called “Auer deference”

is appropriate only in circumstances where an agency's regulation is ambiguous. Christensen, 529 U.S. at 588. When a regulation is unambiguous, the Court should apply the regulation's plain language. Id.

Agencies may issue other forms of guidance in informal formats such as opinions letters, policy statements, agency manuals, and enforcement guidelines that do not have the force of law and therefore do not warrant Chevron-style deference. Id. at 587. Rather, informal agency guidance is entitled to deference to the extent of its power to persuade. Id. (citing Skidmore, 323 U.S. at 140).

This case presents a further nuance to the traditional deference analysis. IDNR is charged with administering the CWA in Iowa. There appears to be conflict among the circuits, and no dispositive Eighth Circuit case, as to the deference owed to a state agency administering a federal program. DMWW asserts the better approach would be to give little or no deference to a state agency administering a federal program with nationwide application. Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist., 280 F.3d 1364, 1368 n.4 (11th Cir. 2002), *vacated on other grounds by* S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95; Nat. Res. Def. Council, Inc. v. U.S. Dep't of Transp., 770 F.3d 1260, 1269 (9th Cir. 2014); *contra* Daniels v. Brown, 550 F. App'x 138, 139-40 (4th Cir. 2013); Bldg. Trades Employers' Educ. Ass'n v. McGowan, 311 F.3d 501, 507 (2d Cir. 2002); Chambers v. Ohio Dep't of Human Servs., 145 F.3d 793, 803 (6th Cir. 1998).

Whatever rule of deference is determined to apply, the plain language of the governing statute cannot be contradicted by deference. As explained in Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 171 (1989):

But, of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding

agency interpretations must fall to the extent they conflict with statutory language.

Applying these rules to the CWA issues here, the EPA definitions set forth in its regulations should be given Chevron deference to the extent it would not be inconsistent with the CWA. The EPA's expressed interpretation of its own regulations, if any, is entitled to Auer deference. Everything else has force only to the extent its reasoning has a power to persuade, including all of the IDNR's interpretations. Regulatory silence and inaction should be seen as having little or no such power to persuade.

As explained above, the EPA's directly applicable regulations are largely expressed in the same terms as CWA, with a small, but highly suggestive nuance connecting stormwater with runoff, which should be given Chevron deference.

By otherwise expressing, without elaboration, its regulations in essentially the same terms as the statute the EPA is enforcing supporting the view that the statute defining point source is clear, complete and sufficient as written.²⁷ The EPA has expressed itself in various areas, such as silviculture, in ways that have proven to be decisive but has neither adopted any regulation governing drainage districts as a separate category, nor even announced any position on drainage districts. The EPA and the EPC have left the statutory words to speak for themselves.

Although Drainage Districts argue that there is a definitive view among the EPA, the IDNR, and other agencies involved with the CWA that Drainage Districts are not required to obtain NPDES permits, that view, if it exists, is entirely expressed by unexplained regulatory inaction or bare assumption to which no deference should be given.

A. There is no useful guidance from the EPA or the IDNR on the issue here.

The applicability of NPDES requirements to the Drainage Districts or any similar body

²⁷ The EPC has done the same in its Rules, particularly in its most recent revision made to more closely adhere to the statutory wording. (Pl. App. at 2306-2307).

has never before been considered in any court case or in any federal or state administrative proceeding. There is no specifically applicable federal regulation or Iowa rule addressing drainage districts that goes substantively beyond, or otherwise explicates, the relevant statutory provisions to which Chevron deference may be given. There is no EPA or IDNR guidance directed to drainage districts or drainage infrastructure to which Skidmore deference may be given. There is only an unexplained failure to apply the plain meaning of the CWA definition of point source to drainage districts.²⁸

Drainage districts seem simply to have never been explicitly addressed by the NPDES permitting process by either the EPA or IDNR prior to the DMWW's Notice of Intent, perhaps because of a perceived connection to agriculture, or as a matter of other priorities deemed more pressing, or perhaps for other unexplained reasons.

Drainage Districts have submitted the Affidavit of the current Director of the IDNR, Chuck Gipp, that states that Drainage Districts have "historically" been treated, considered and characterized as nonpoint sources or "agriculturally-related nonpoint sources of pollution and/or within the exclusion for nonpoint source 'agricultural storm water runoff'..." (App. at 133). This Affidavit expresses a historic fact that drainage districts have not been required to obtain NPDES permits because they have not heretofore been considered to be point sources, but offers neither substantive explanation, nor details as to any actual affirmative decision to that effect.²⁹ In short, the IDNR has never expressed any reasoned consideration of the exact issue presented

²⁸ Drainage District rely on Bill Stowe's report of discussions with EPA and IDNR officials to the effect that the NPDES will not be applied by them to drainage districts. (App. at 19-20, 26, 188-189). The fact of inaction is undisputed. The rationale remains unexpressed.

²⁹ The Gipp Affidavit at ¶8, (App. at 133), also refers to the categorization of flows from drainage districts as nonpoint source in its TMDL determination for the Raccoon River in 2008 that was reviewed and approved by the EPA. No details are provided to which Skidmore deference might be given. DMWW would note that such treatment seems consistent with IDNR's apparent general practice of simply assuming all unpermitted sources to be nonpoint.

nor has it provided any useful guidance.

The Drainage Districts' rely heavily on a document offered by IDNR staff in the course of 2009 EPC rulemaking process under Iowa Code, Chapter 17A, pertaining to amendments to the definition of "discharge of a pollutant." They suggest that the discussion reflects an administrative decision that drainage facilities are nonpoint sources as a matter of law. Compare (Pl. App. at 1555-1560) and (App. at 189-190).³⁰

The actual IDNR staff discussion says no such thing. Responding to multiple comments from animal feeding operations that raised questions about a range of things from storm water to conservation, and included a reference to "field tile", IDNR staff advised the EPC to make no change to the proposed rule as previously published, merely noting how the definition of point source fit in with the definition being amended:

The definition "discharge of a pollutant" means any addition of any pollutant or combination of pollutants to navigable waters or waters of the state from any point source. The definition of point source states that return flows from irrigated agriculture or agricultural storm water runoff are not point sources. As the discharge of a pollutant is an addition of a pollutant from any point source, and return flows from irrigated agriculture or agricultural storm water runoff are not point sources, it follows that return flows from irrigated agriculture or agricultural storm water runoff are not a discharge of a pollutant. Thus, agricultural stormwater and any USDA conservation practices consisting of return flow from irrigated agriculture are not being added to the definition of discharge of a pollutant...

(App. at 189); (Pl. App. at 1555-560).

Delphic in its ambiguity and non-responsiveness, there is nothing in the discussion that addresses in any substantive way how the definition of "discharge of a pollutant" as adopted, might apply to drainage districts. Like the underlying rules themselves, the discussion recites the

³⁰ Drainage Districts also argue that the DMWW CEO endorsed their view of this document in his deposition. Stowe Dep. at 284-285 (App. at 20). It is unclear that Mr. Stowe's testimony meant exactly that, but in any case, Mr. Stowe's opinion as to a legal conclusion is inadmissible.

statutory exclusions for “agricultural stormwater discharges” and “irrigation return flow” without adding any particular insight. In any case, the adopting action by the EPC says nothing about field tile or drainage, doubtless in furtherance of its view that the text of the CWA governs all. (Pl. App. at 1555-1560).

B. The casual categorization of tile drainage as “nonpoint source” pollution by some agency documents is neither dispositive nor persuasive.

The assertion by the Drainage Districts that the EPA, IDNR, and agencies in other states have sometimes categorized agricultural drainage as nonpoint source in various documents is overstated and unpersuasive.

The EPA sources cited simply do not support the premise. The general EPA website has been previously addressed in this Brief and the EPA documentation makes it clear, as do the courts that the definition of point source controls, not vice versa.

Drainage Districts refer to the IDNR’s Water Quality Improvement Plan for the Raccoon River for the proposition that groundwater and the flows are considered nonpoint sources. (App. at 240) (“The vast majority of nonpoint source nitrate loads are delivered to streams with groundwater and tile flow”). This is a valid statement of scientific fact as to groundwater and tile being the primary source of nitrate loads in the Raccoon River watershed, but it implies an incorrect conclusion of law as to what is, or is not, a point source. Indeed, this casual use of the term nonpoint source appears to be a general convention in IDNR documents—point sources are those sources that are, in fact, currently permitted, whereas nonpoint sources are everything else.³¹ This convention does nothing to address the issue presented here on the merits.

Drainage Districts also cite several agency documents from other states to the same

³¹ See e.g. the Iowa Nutrient Reduction Strategy as explained by IDNR Scientist Mary Skopec. (Skopec Tr. 53:15-55:2 (Pl. App. at 2252)).

effect, but make no effort to show the degree to which each such state has made a study or investigation of the legal issues presented here. This is at best a collateral issue with very little probative value since no state can control the meaning of the federal terms at issue here or the Iowa law, but DMWW will observe that nothing in the materials provided to the Court reflects any reasoning as to why drainage pipes and ditches and other such sources are not point sources. As such, the materials are unpersuasive as to the issues here.

C. DMWW's claim is not defeated by the failure of EPA and IDNR to enforce permit requirements against drainage districts.

For the same reasons that causal references by EPA, IDNR, and others are not binding on the Court, IDNR's and EPA's failure to act should not be given any analytical weight. The Drainage Districts rely on the lack of previous NPDES permit enforcement to argue that the claim presented here is unfounded. Citing Bankamerica Corporation v. United States, 462 U.S. 122, 131 (1983), they argue that inaction "strongly suggests" their position has been adopted by the agencies charged with enforcement of the CWA. That is one explanation for inaction. Others might be a lack of understanding of the actual facts, an allocation of scarce enforcement resources, or even unwillingness to confront a politically powerful interest group.

In any case Bankamerica Corp. itself notes:

It is true, of course, that "[a]uthority granted by Congress ... cannot evaporate through lack of administrative exercise,"; the mere failure of administrative agencies to act is in no sense "a binding administrative interpretation" that the Government lacks the authority to act.

Id. (citation omitted).

Moreover, this argument mistakes the role of the Court in a citizen suit. In Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Incorporated, 299 F.3d 1007, 1012-13 (9th Cir. 2002), the Court held that even an explicit decision by a state agency that an

NPDES permit is not required does not preclude court consideration of such issue on its merits in a citizen suit.

Although the EPA or an authorized state agency may be charged with enforcement of the Clean Water Act, neither the text of the Act nor its legislative history expressly grants to the EPA or such a state agency the exclusive authority to decide whether the release of a substance into the waters of the United States violates the Clean Water Act. *See Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 566–67 (5th Cir.1996) (holding courts may determine in citizen suits whether discharged substance is pollutant even if EPA has not issued NPDES permit). Here, if EPA and [State Agency] decline enforcement, then they have no statutory or common law right to veto environmental review sought by a citizen who otherwise has complied with the Act.

See also San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700, 706 (9th Cir. 2007).

X. The Issues Under Chapter 455B Track The CWA Issue With Some Exceptions Favoring DMWW

The Drainage Districts' insist that under Iowa Code Chapter 455B and its implementing rules that they are not subject to obtaining an "operation permit". They assert that "operations permits" are only required for "disposal systems" that dispose of sewage, industrial waste, and other waste. This argument misconstrues Iowa statutory provisions and the IDNR rules that apply to discharges of pollution by a point source.

Under Iowa Code 455B.186:

A pollutant shall not be disposed of by dumping, depositing, or discharging such pollutant into any water of the state, except that this section shall not be construed to prohibit the discharge of adequately treated sewage, industrial waste, or other waste pursuant to a *permit* issued by the director.

The IDNR rules define "NPDES Permits" as:

"NPDES Permit" means an *operation permit*, issued after the department has obtained approval of its National Pollutant Discharge Elimination System (NDPES) program from an administrator, that authorizes the discharge of any pollutant into a navigable water.

Iowa Admin. Code r. 567-60.2 (emphasis added).

"Operation Permit" is defined under the rules as: [A] written permit by the

director authorizing the operation of a wastewater disposal system or part thereof or discharge source and, if applicable, the discharge of wastes from the disposal system or part thereof or discharge source to waters of the state. An NPDES permit will constitute the operation permit in cases where there is a discharge to a water of the United States and an NPDES permit is required by the Act.

Iowa Admin. Code r. 567-60.2.

Although the IDNR's use of the word "operation permit" in the context of both waste disposal and NPDES permits is confusing, DMWW maintains that under Iowa Code Chapter 455B, the Drainage Districts must obtain NPDES permits to the same extent and for the same reasons as apply under the CWA. The term "operation permit" in the definition of NPDES permit does not limit the applicability of this provision or require that there be a discharge or disposal of a hazardous waste under Section 455E.6 of the Iowa Code.

There are three ways in which Iowa law and the CWA do diverge in important respects. The first way is that the CWA excludes "agricultural stormwater discharges" and "irrigation return flows" from the definition of point source. The Iowa Code does not. See Iowa Code § 455B.171(19). Thus, under Chapter 455B, the exclusions would be a matter of affirmative defense. A party asserting an affirmative defense has the burden to establish it. See, e.g., Iowa Mortgage Center, L.L.C. v. Baccam, 841 N.W.2d 107 (Iowa 2013). Thus, Drainage Districts have the burden of showing one of the exclusions applies, which they have failed to do.

Second, Iowa law protects all waters of the state, which as defined by Iowa Code Section 455B.171(39) is broader than the jurisdictional waters of the United States under the CWA. Regardless, no issue concerning this seems to be raised by the current motion.

Finally, Drainage Districts rely heavily on a supposed interpretation by the IDNR that they argue excludes them. See (App. at 189-190). However, this interpretation is not expressed in any rule adopted by the EPC under the Iowa Administrative Procedures Act, Chapter 17A, Code

of Iowa. In any case it is highly doubtful that Iowa law allows either the EPC or IDNR to decide what is or is not a point source.

Iowa law is less willing to grant deference to state agencies than federal law. As explained in Renda v. Iowa Civil Rights Commission, 784 N.W.2d 8 (Iowa 2010):

We give deference to the agency's interpretation if the agency has been clearly vested with the discretionary authority to interpret the specific provision in question. If, however, the agency has not been clearly vested with the discretionary authority to interpret the provision in question, we will substitute our judgment for that of the agency if we conclude the agency made an error of law.

(citations omitted). Also, Iowa generally does not to give deference to agency determinations of the meaning of terms such as point source that are defined by statute. Hawkeye Land Co. v. Iowa Utils. Bd., 847 N.W.2d 199, 207-08 (Iowa 2014). Application of this rule to the IDNR is in any case problematic because the discretion granted by statute to make rules is actually vested in the EPC. Iowa Code 455A.6.

However, this state law doctrine may not matter because there is no genuine agency interpretation presented. The IDNR has never issued a permit for discharge, but the IDNR rules as written support neither inaction, nor non-enforcement on the facts as set forth in DMWW's Record. There is nothing in all of this to which deference may be given under Iowa law.

XI. The Time Has Come to Address Drainage Districts

The basic theme of the Drainage Districts' argument is that since 1972, forty years of accumulated conventional wisdom and inaction precludes the treatment of the Drainage Districts as anything but nonpoint sources. This theme ignores the actual arc of history which has bended towards an ever greater inclusion of point sources as statutorily defined by the CWA.

Perhaps drainage districts have merely not made it to the top of today's regulatory to-do list. If so, this would not be the only recent example of neglect for public health and safe and

clean water. Moreover, regulatory inaction does not change the statutory landscape. The time has come to address pollution from drainage and to apply the “core command” of the CWA to the Drainage Districts as the statute dictates.

CONCLUSION

WHEREFORE for the reasons articulated above DMWW respectfully requests that the Court deny Defendants’ Motion for Partial Summary Judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2016, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following

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